(17)

No. 03-1160
Title: Azel P. Smith, et al., Petitioners
v.
City of Jackson, Mississippi, et al.
Docketed: February 13, 2004
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (02-60850)
Decision Date: November 13, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~
Feb 11 2004	Petition for a writ of certiorari filed. (Response due March 15, 2004)
Mar 2 2004	Brief of respondents City of Jackson, Mississippi, et al. in opposition filed.
Mar 10 2004	DISTRIBUTED for Conference of March 26, 2004.
Mar 10 2004	Reply of petitioners Azel P. Smith, et al. filed. (Distributed)
Mar 29 2004	Petition GRANTED.
Apr 20 2004	Record received from U.S.C.A. 5th Circuit. (1 envelope)
Apr 30 2004	Record received from U.S.D.C. Southern District of Mississippi (1 box)
May 5 2004	Consent to the filing of amicus briefs in support of the petitioners received from counsel for the respondents.
May 7 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including June 14, 2004.
May 7 2004	Extension of time within which to file respondent's brief on the merits to and including August 23, 2004.
May 7 2004	Blanket consent for the filing of amicus curiae briefs received from counsel for petitioners.
Jun 7 2004	Brief amici curiae of Cornell University Chapter of American Assn. of University Professors, et al. filed.
Jun 14 2004	Brief of petitioners Azel P. Smith, et al. filed.
Jun 14 2004	Further extension of time within which to file the joint appendix to and including June 28, 2004.
Jun 14 2004	Brief amicus curiae of Academy of Florida Trial Lawyers filed.
Jun 14 2004	Brief amici curiae of AARP, et al. filed.
Jun 14 2004	Brief amici curiae of National Employment Lawyers Association, et al. filed.
Jun 14 2004	Joint appendix filed.
Aug 19 2004	Brief amicus curiae of Pacific Legal Foundation filed. (Distributed).
Aug 23 2004	CIRCULATED.
Aug 23 2004	Brief of respondents City of Jackson, Mississippi, et al. filed. (Distributed)
Aug 23 2004	Brief amici curiae of National League of Cities, et al. filed.
Aug 23 2004	Brief amicus curiae of California Employment Law Council filed.
Aug 23 2004	Brief amicus curiae of Equal Employment Advisory Council filed.
Aug 23 2004	Brief amicus curiae of Chamber of Commerce of the United States filed.
Sep 1 2004	SET FOR ARGUMENT Wednesday, November 3, 2004.
Sep 27 2004	Reply of petitioners Azel P. Smith, et al. filed. (Distributed)

Docket for 03-1160

Nov 3 2004	Argued. For petitioners: Thomas C. Goldstein, Washington, D.C. For respondents: Glen D. Nager, Washington, D.C.

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No. 03-031160

IN THE

Supreme Court of the United States

Azel P. Smith, *et al.*,

Petitioners,

v.

City of Jackson, Mississippi, and
Police Department of the City of Jackson, Mississippi.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 10, 2004

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QUESTION PRESENTED

Should this Court grant certiorari to resolve the five-to-three circuit conflict over whether disparate impact claims are cognizable under the Age Discrimination in Employment Act?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Willie Allen; Joe L. Austin; Jerry Brister; Gloria Burns; Jacqueline Butler; Harvey L. Davis; William H. Gladney, Sr.; Tommie L. Grant; Ned Garner; William R. Gardner; Samuel Haymer; James J. Howard; Warren E. Hull; Thomas Hunter; Arlander Luallen, Jr.; Willie Mack; Eugene McDonald; Carey N. Parkinson; Ruthie Porter; Cleotha Ratliff; John M. Russell; David L. Shaw; Wayne Simpson, Jr.; Richard J. Smith; Kenneth W. Stemmons; James B. Strawbridge; Alphonso Taylor; Miller Weston; and Shirley Williams.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISION 1
STATEMENT 2
REASONS FOR GRANTING THE WRIT 5
I. The Courts of Appeals Are Intractably Divided over the Question Presented. 6
II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented. 9
III. This Case Is an Ideal Vehicle to Resolve the Question Presented. 11
IV. The Fifth Circuit's Decision Is Wrong on the Merits. 13
CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Adams v. Ameritech Services, 231 F.3d 414 (CA7 2000), *reh'g and reh'g en banc denied* (Jan. 9, 2001) 8
Adams v. Florida Power Corp., 255 F.3d 1322 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002) 4, 6, 7, 12
Alaska Dep't of Env'tl Conservation v. EPA, __ U.S. __, 72 U.S.L.W. 4133 16
Allen v. Energy Corp., Inc., 193 F.3d 1010 (CA8 1999) 9
Auer v. Robbins, 519 U.S. 452 (1997) 17
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 16
County of Washington v. Gunther, 452 U.S. 161 (1981).. 5, 15
Dothard v. Rawlinson, 433 U.S. 321 (1977) 11
EEOC v. Francis W. Parker School, 41 F.3d 1073 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995) 7, 8
EEOC v. Hickman Mills Consolidated School District No. 1, 99 F. Supp. 2d 1070 (W.D. Mo. 2000) 10
EEOC v. Local 350, Plumbers and Pipefitters, 998 F.2d 641 (CA9 1992), *as amended on denial of reh'g and reh'g en banc* (July 6, 1993) 8
EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (CA8 1999) 9
EEOC v. Wyoming, 460 U.S. 226 (1983) 14
Ellis v. United Airlines, Inc., 73 F.3d 999 (CA10 1996), *reh'g-denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996) 7, 8
Evers v. Alliant Techsystems, Inc., 241 F.3d 948 (CA8 2001) 9

Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419 (CA10 1993) 7
Frank v. United Airlines Inc., 216 F.3d 845 (CA9 2000), *cert. denied*, 532 U.S. 914 (2001) 6, 8
Geller v. Markham, 635 F.2d 1027 (CA2 1980) 6, 12
Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..... passim
Harlston v. McDonnell Douglas Corp., 37 F.3d 379 (CA8 1994) 9
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 2, 3, 7
Holt v. Gamewell Corp., 797 F.2d 36 (CA1 1986) 7
Houghton v. SIPCO, Inc., 38 F.3d 953 (CA8 1994) 9
Leftwich v. Harris-Stowe State College, 702 F.2d 686 (CA8 1983) 7, 12
Lewis v. Aerospace Community Credit Union, 114 F.3d 745 (CA8 1997), *reh'g and sugg. for reh'g en banc denied* (July 3, 1997), *cert. denied sub nom. Kelleher v. Aerospace Comty Credit Union*, 523 U.S. 1062 (1998) 6, 8, 9
MacNamara v. Korean Air Lines, 863 F.2d 1135 (CA3 1988), *cert. denied*, 493 U.S. 944 (1989) 7
MacPherson v. Univ. of Montevallo, 922 F.2d 766 (CA11 1991) 7
Maresco v. Evans Chemetics, Div. of W.R. Grace & Co., 964 F.2d 106 (CA2 1992) 7
Markham v. Geller, 451 U.S. 945 (1981) 6
Monroe v. United Airlines, Inc., 736 F.2d 394 (CA7 1984), *cert. denied*, 470 U.S. 1004 (1985) 7
Mullin v. Raytheon Co., 164 F.3d 696 (CA1 1999) 6, 7
Nat'l R.R. Corp. v. Morgan, 536 U.S. 101 (2002) 16
Pulla v. Amoco Oil Co., 72 F.3d 648 (CA8 1996) 9
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 16
Smith v. City of Des Moines, 99 F.3d 1466 (CA8 1996) 7, 9
Smith v. Xerox Corp., 196 F.3d 358 (CA2 1999) 6, 7
Teamsters v. United States, 431 U.S. 324 (1977) 3

Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64 (CA8 1997) 9
Thweatt v. Electronic Data Systems Corp., cert. denied, 124 S. Ct. 922 (2003) 12
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 14
Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) 16
Wooden v. Bd. of Educ. of Jefferson Cty., Ky., 931 F.2d 376 (CA6 1991) 7

Statutes

28 U.S.C. 1254(1). 1
29 U.S.C. 206(d)(1) 5, 15
29 U.S.C. 623(a) 2, 14
29 U.S.C. 623(f) 5, 14
29 U.S.C. 625 15
29 U.S.C. 628 16
29 U.S.C. 631(a) 3
42 U.S.C. 2000e-2(a) 2, 14
42 U.S.C. 2000e-2(k)(1)(A)(i) 12, 15
42 U.S.C. 2000e-12(a) 16

Other Authorities

29 C.F.R. 1625.7(d) 15
46 Fed. Reg. 47,724 (Sept. 29, 1981) 15
Brief in Opposition, No. 03-349, *Thweatt v. Electronic Data Systems Corp.* 13
Executive Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978) 15
Oral Argument Transcript, No. 01-584, *Adams v. Florida Power Corp.* 13
Petition for Certiorari, No. 03-349, *Thweatt v. Electronic Data Systems Corp.* 13

U.S. Department of Labor, Bureau of Labor Statistics, *at* http://data.bls.gov/labjava/outside.jsp?survey=ln (last visited Feb. 2, 2004) 9

PETITION FOR A WRIT OF CERTIORARI

Petitioners Azel P. Smith, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-38a) is published at 351 F.3d 183. The district court's order granting summary judgment in favor of respondents (Pet. App. 39a-49a), dated September 6, 2002, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, provides in relevant part:

(a) It shall be unlawful for an employer—

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age * * *
>
> * * * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age * * *.

29 U.S.C. 623

STATEMENT

Petitioners allege that respondents violated the Age Discrimination in Employment Act by adopting a pay policy that has a disparate impact on employees who are forty years of age and older. Acknowledging the deep split among the courts of appeals, the Fifth Circuit held that disparate impact claims are not cognizable under the ADEA.

1. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. 623(a)(1), or "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as employee, because of such individual's age," *id.* § 623(a)(2). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court interpreted nearly identical language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), to encompass both disparate treatment and disparate impact theories of liability.

Disparate treatment claims allege intentional discrimination on the basis of a protected characteristic. To succeed on a disparate treatment theory, plaintiffs must show that a protected characteristic "actually played a role [in the employer's decision] and had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

In contrast, disparate impact claims—such as the claim at issue in this petition—do not depend on the motivation for the challenged practice. Under a disparate impact theory, an employee must instead demonstrate that an employer's plan or policy adversely affected a protected group in comparison to members of a non-protected group. *See Hazen Paper Co.*, 507 U.S. at 609 (citing *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977)); *Griggs*, 401 U.S. at 431 (characterizing disparate impact claims as looking beyond "overt discrimination * * * [to] practices that are fair in form, but discriminatory in operation").

2. Petitioners are police officers and public safety officers employed by respondents, the City of Jackson, Mississippi and its police department. Petitioners are all at least forty years of age and therefore fall within the class protected by the ADEA. *See* 29 U.S.C. 631(a).

Respondents recalibrated their employee pay scale by adopting a Performance Pay Plan on October 1, 1998, and revising it effective March 1, 1999 ("Pay Plan"). The new scale progresses from Step 1 to Step 5 in half-step increments, with each half step corresponding to a defined pay range. The Pay Plan initially assigned employees with fewer than five years of service to Step 1 and employees with five or more years of service to Step 1.5. Each employee was entitled to at least a 2% raise from his or her pre-Pay Plan salary. If the initial assignment failed to increase the employee's salary by at least 2%, the employee was then placed in the lowest half step that resulted in at least a 2% increase from his or her previous salary. Employees whose pay was already higher than the minimum salary in the Step 5 range received only a 2% raise.

Petitioners allege that the Pay Plan had a disparate impact on employees who are age forty or older by providing them

with proportionately smaller wage increases than were granted to employees under the age of forty.[1]

3. The district court granted respondents' motion for summary judgment on the grounds that the ADEA "does not allow for claims of disparate impact." Pet. App. 47a-48a. Although acknowledging that "[t]he Circuit Courts that have considered the issue are split," *id.* at 46a, the district court followed the circuits that have refused to allow disparate impact claims. Emphasizing the Eleventh Circuit's view that "the use of factors correlated with age * * * did not rely on 'inaccurate and stigmatizing stereotypes' and was acceptable," *id.* at 47a (quoting *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (CA11 2001) (internal citation omitted), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002)), the district court concluded that *Hazen Paper* strongly suggested that "no disparate impact claim should lie in cases such as this one." Pet. App. 47a.

4. A divided panel of the court of appeals affirmed. The majority opinion acknowledged the current "debate amongst the courts of appeals regarding whether the ADEA, like Title VII, entitles a plaintiff to bring a disparate impact claim," Pet. App. 6a, and, "[a]fter surveying the well-traversed arguments" of this debate, *id.* at 7a, concluded that "a disparate impact theory of liability is not cognizable under the ADEA," *id.* at 21a. The majority rejected the approach taken by the Second, Eighth, and Ninth Circuits, aligning itself instead with the First, Seventh, Tenth, and Eleventh Circuits.

The court of appeals based its decision on the statute's text and legislative history. The court acknowledged the similarities between Title VII and the ADEA, but stressed that the ADEA allows employers to differentiate between

[1] Petitioners also alleged that the Pay Plan constituted illegal disparate treatment. The Fifth Circuit remanded that claim to the district court, and it is not at issue here.

employees based upon "reasonable factors other than age," 29 U.S.C. 623(f)(1), while Title VII does not. The court of appeals then noted that in *County of Washington v. Gunther*, 452 U.S. 161, 169-71 (1981), this Court interpreted the Equal Pay Act's exception for different treatment based on "any other factor other than sex," 29 U.S.C. 206(d)(1), to preclude disparate impact claims. Pet. App. 16a. It concluded that the "reasonable factors other than age" exception makes the ADEA more like the Equal Pay Act than Title VII. *Id.* at 17a. The majority also considered the ADEA's legislative history and concluded that Congress only intended the statute to prohibit intentional discrimination based on age. *Id.* at 18a-22a.

Judge Stewart dissented vigorously, arguing that the ADEA's "reasonable factors other than age" language merely codified a business necessity exception to disparate impact claims analogous to the one available under Title VII, as opposed to prohibiting such claims outright. He further rejected the majority's reliance on the Equal Pay Act. He argued that the majority ignored the fact that the "terms 'any' [as found in the EPA] and 'reasonable' [as found in the ADEA] are not synonymous." Pet. App. 32a. Turning to the legislative history, Judge Stewart noted that the ADEA, like Title VII, was intended to "rid[] from the workplace an environment of *concealed* discrimination" and that "a disparate impact theory may be a plaintiff's only tool in counteracting sophisticated discrimination." *Id.* at 34a. Ultimately, Judge Stewart concluded that the majority erred when it refused to find disparate impact claims cognizable under the ADEA.

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are intractably divided over whether disparate impact claims are cognizable under the Age Discrimination in Employment Act. Given the importance of the ADEA to the American workplace, such a conflict is

untenable. This case presents the ideal vehicle to decide this important and frequently litigated issue. Finally, the Fifth Circuit erred in concluding that the ADEA forbids disparate impact claims despite this Court's holding that the indistinguishable language of Title VII permits such actions. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Certiorari accordingly should be granted.

I. The Courts of Appeals Are Intractably Divided over the Question Presented.

In its opinion, the Fifth Circuit acknowledged that there is a longstanding and deep conflict among the circuits over whether disparate impact claims are cognizable under the ADEA. Pet. App. 6a-7a. This Court granted certiorari to resolve that question in *Adams v. Florida Power Corp.*, 534 U.S. 1054 (2001), but ultimately dismissed the writ as improvidently granted. 535 U.S 228 (2002). Indeed, the question has been noted as appropriate for resolution for more than two decades. *See Markham v. Geller*, 451 U.S. 945, 948-49 (1981) (Rehnquist, J., dissenting from denial of certiorari).

Three circuits—the Second, Eighth, and Ninth—squarely hold that disparate impact claims are cognizable under the ADEA. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358, 367 (CA2 1999) (citing *Geller v. Markham*, 635 F.2d 1027, 1032 (CA2 1980)); *Lewis v. Aerospace Community. Credit Union*, 114 F.3d 745, 750 (CA8 1997), *reh'g and sugg. for reh'g en banc denied* (July 3, 1997), *cert. denied sub nom. Kelleher v. Aerospace Cmty. Credit Union*, 523 U.S. 1062 (1998); *Frank v. United Airlines Inc.*, 216 F.3d 845, 856 (CA9 2000), *cert. denied*, 532 U.S. 914 (2001).

In contrast, five circuits—the First, Fifth, Seventh, Tenth, and Eleventh—apply the contrary rule. These courts, while acknowledging that the circuits are split on this issue, have held that disparate impact claims may not be brought under the ADEA. *See Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (CA1 1999); *EEOC v. Francis W. Parker School*, 41 F.3d

1073, 1076-78, 1079 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (CA10 1996), *reh'g denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *writ dismissed as improvidently granted*, 535 U.S 228 (2002).

This circuit split has not been resolved by this Court's opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

Prior to *Hazen Paper*, most courts that considered the issue had held that disparate impact claims were available under the ADEA. *See Holt v. Gamewell Corp.*, 797 F.2d 36 (CA1 1986); *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106 (CA2 1992); *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (CA3 1988), *cert. denied*, 493 U.S. 944 (1989); *Wooden v. Bd. of Educ. of Jefferson Cty., Ky.*, 931 F.2d 376 (CA6 1991); *Monroe v. United Airlines, Inc.*, 736 F.2d 394 (CA7 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (CA8 1983); *MacPherson v. Univ. of Montevallo*, 922 F.2d 766 (CA11 1991). *See also Faulkner v. Super Valu Stores*, 3 F.3d 1419 (CA10 1993). Even though *Hazen Paper* expressly left open the question whether the ADEA allows disparate impact claims, 507 U.S. at 610, it caused some lower courts "to rethink the viability of disparate impact doctrine in the ADEA context." *Mullin*, 164 F.3d at 700.

But since *Hazen Paper*, several circuits have firmly adhered to their precedents holding that disparate impact claims are cognizable. These circuits have announced that they will not change their interpretation "absent a 'clear indication' that it has been overruled." *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (CA8 1996) (internal citation omitted). *See also Smith v. Xerox Corp.*, 196 F.3d at 367 n.6 (reaffirming the Second Circuit's recognition of disparate

impact claims even though "[s]everal circuits have rejected or called into questions the availability of a disparate impact cause of action under the ADEA in light of *Hazen*"); *Frank*, 216 F.3d 845 (holding that the district court erred by concluding that disparate impact claims were no longer available after *Hazen Paper*).

This Court's intervention is therefore required because the circuit conflict is intractable. While some courts reconsidered their positions in the immediate aftermath of *Hazen Paper*, it has now been over a decade since that decision. In that time, the courts of appeals have solidified their positions, consistently denying petitions for rehearing and rehearing en banc. *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (CA7 1994), *reh'g and sugg. for reh'g en banc denied* (Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995); *EEOC v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641 (CA9 1992), *as amended on denial of reh'g and reh'g en banc* (July 6, 1993); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (CA10 1996), *reh'g denied* (Feb. 9, 1996), *cert. denied*, 517 U.S. 1245 (1996). Indeed, the circuits' positions have become so entrenched that the courts no longer discuss the reasoning behind their conclusions, but merely reiterate that a disparate impact claim is, or is not, cognizable within that circuit. *See, e.g., Adams v. Ameritech Services*, 231 F.3d 414, 422 (CA7 2000), *reh'g and reh'g en banc denied* (Jan. 9, 2001) (stating simply that "disparate impact is not a theory available to age discrimination plaintiffs in this circuit"); *Lewis*, 114 F.3d at 750 (noting merely that "[a]lthough the Supreme Court has yet to rule on this legal question, [the Eighth Circuit] continues to recognize the validity of such claims under the ADEA") (internal citation omitted).

The circuits' firm commitments to their conflicting views demonstrate that this Court's intervention is necessary.

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

Almost seventy million employees age forty and over—nearly half of the civilian labor force—are protected by the ADEA. U.S. Department of Labor, Bureau of Labor Statistics, *at* http://data.bls.gov/labjava/outside.jsp?survey=ln (last visited Feb. 2, 2004). Because the Act covers so many employees, the question presented is of great importance to the national economy.

It is therefore unsurprising that eight circuits have taken a position on this question and that most have faced the issue repeatedly. For example, since *Hazen Paper*, the Eighth Circuit has published nine decisions in which disparate impact claims were squarely presented.[2] Furthermore, federal district courts have reported at least ninety-five opinions since *Hazen Paper* in which disparate impact was alleged.[3]

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[2] *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948 (CA8 2001); *Allen v. Energy Corp., Inc.*, 193 F.3d 1010 (CA8 1999); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (CA8 1999); *Lewis*, 114 F.3d 745; *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64 (CA8 1997); *Smith v. City of Des Moines*, 99 F.3d 1466; *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (CA8 1996); *Houghton v. SIPCO, Inc.*, 38 F.3d 953 (CA8 1994); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379 (CA8 1994).

[3] This statistic was derived from a Westlaw search for reported U.S. district court cases in which the words "disparate impact" appeared within 20 words of "ADEA" or "Age Discrimination in Employment Act" (excluding any cases in which the court was merely describing the theory, as opposed to considering its relevance to that case). This statistic underestimates the number of disparate impact claims that were actually brought, as many district court rulings were unreported. Moreover, this number of course excludes the many disparate impact claims that have been settled, as well as the otherwise valid claims that plaintiffs have forgone pursuing in the five circuits that currently forbid such claims. And, naturally, the potential exposure to liability under the ADEA affects employers' decisions in designing

The importance of this question is heightened because it is outcome determinative. Where disparate impact claims are available, employees have been able to vindicate their rights in the federal courts. For example, in *EEOC v. Hickman Mills Consolidated School District No. 1*, 99 F. Supp. 2d 1070 (W.D. Mo. 2000), the court granted summary judgment in favor of plaintiffs on their disparate impact claim. Their employer had a policy that decreased early retirement benefits by 10% for every year a teacher worked beyond the date when he or she was first eligible for full retirement. Because plaintiffs showed through statistical analysis that "as age at retirement went up, the average percent and dollar amount of benefit went down," *id.* at 1077, and the school district "failed to submit any substantial proof of savings" to justify its policy, *id.* at 1078, plaintiffs prevailed on their disparate impact claim. In contrast, where the cognizability of such claims has been rejected, employees are left without a remedy when they have been subjected to policies that unfairly disadvantage them.

The frequent recurrence of this issue and its importance to tens of millions of Americans makes the conflict among the circuits untenable. Under the current legal regime, the scope of an employee's federal rights varies with the location of his or her employment. As long as the circuits disagree, police officers in Jackson, Missouri (within the Eighth Circuit) are protected against policies that disproportionately affect older employees, whereas officers in Jackson, Mississippi (within the Fifth Circuit) are not. The present situation also creates special difficulties for employees of corporations with multiple offices nationwide, most of whom are likely unaware that the acceptance of a transfer or promotion to another location may strip them of rights that they would otherwise have. Indeed, forum selection clauses in employment contracts may deprive even those employees who work within

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their employment policies, meaning that the law's impact cannot be measured in terms of the number of litigated cases alone.

circuits that allow disparate impact claims of the rights enjoyed by their neighbors.

The central role that the ADEA plays in millions of Americans' employment relationships underscores the need for clear guidance from this Court.

III. This Case Is an Ideal Vehicle to Resolve the Question Presented.

Petitioners' complaint sets out a prototypical disparate impact claim by challenging the effect of a specific employment practice upon a class of protected workers. Petitioners challenge the respondents' 1998 adoption of a new Pay Plan, which set new salary ranges based on employees' years of service and previous earnings. Using statistical analysis of the Pay Plan's effects on all employees, petitioners allege that the adoption of the Plan had a disparate impact upon the class of employees protected by the ADEA. The Complaint expressly alleges that the Plan "increased the pay for younger workers at the expense of the officers and employees who were over 40 years of age." Complaint ¶ 9. Petitioners' expert subsequently determined that the Plan "resulted in pay increases to officers under forty years of age that were four standard deviations higher than the raises received by officers over forty." Pet. App. 5a.

Thus, petitioners' claim mirrors the kind of disparate impact claims this Court has recognized under the nearly identical language of Title VII. For example, in *Griggs*, this Court invalidated a power company's promotion policy that required either a high school diploma or an intelligence test, since that policy disproportionately limited employment opportunities for racial minorities and bore no demonstrable relationship to job performance. 401 U.S. at 431. Similarly, in *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977), this Court invalidated an Alabama policy requiring a minimum height and weight for prison guards, since the policy had a disparate impact on female applicants and the state did not prove that it was correlated with job performance. Congress

eventually amended Title VII to codify this proscription of employment practices that have a disparate impact upon a protected class but are unjustified by a business necessity. *See* 42 U.S.C. 2000e-2(k)(1)(A)(i). This case, like *Griggs*, *Dothard*, and actions arising under § 2000e-2(k), challenges a clear, nondiscretionary employment practice with a calculable disproportionate impact on a protected class.

Courts in other circuits have found liability on disparate impact claims analogous to the allegations presented in petitioners' complaint. In *Geller v. Markham*, 635 F.2d 1027 (CA2 1980), *cert. denied*, 451 U.S. 945 (1981), for example, the Second Circuit held that a school district's policy of refusing to hire teachers with more than five years of experience had a disparate impact upon older workers, given the plaintiffs' statistical evidence showing a "high correlation between experience and membership in the protected age group." *Id.* at 1033. Similarly, in *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (CA8 1983), the Eighth Circuit found that a policy reserving spots for less expensive, non-tenured professors on a new state college faculty had a disparate impact on employees protected by the ADEA, given the plaintiffs' statistical evidence of a "positive, significant correlation between age and salary for faculty members." *Id.* at 690. The Pay Plan at issue here is similar to the challenged employment practices in *Geller* and *Leftwich*, and petitioners intend to introduce similar evidence to show that the Pay Plan has a disparate impact on protected workers.

The foregoing illustrates why this case, unlike *Adams v. Florida Power Corp.*, 255 F.3d 1322 (CA11 2001), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002), and *Thweatt v. Electronic Data Systems Corp.*, *cert. denied*, 124 S. Ct. 922 (2003), is the ideal vehicle to resolve the question presented. This case is fundamentally different from *Adams*, in which members of this Court pressed the petitioners to identify "the precise rule * * * that's comparable to a high school diploma," as in *Griggs*, or "a height and weight" standard, as

in *Dothard*. Oral Arg. Trans., No. 01-584, *Adams v. Florida Power Corp.*, at 15. Adams' counsel was unable to identify any practice that caused the disparate impact, save the employer's general "decision to downsize itself." *Id.* at 7. *See also id.* at 15-16. In contrast to *Adams*, but like *Griggs* and *Dothard*, petitioners here challenge a specific employment practice—the Pay Plan, an explicit, written policy.

This case is also very different from *Thweatt*, in which the petitioners asked this Court to review a "Performance Management *Process*" that used manager evaluations to rank employees, to determine compensation, and to select candidates for termination. Pet. for Cert., No. 03-349, *Thweatt v. Electronic Data Systems Corp.*, at 9 (emphasis added). The respondents in *Thweatt* correctly noted that the petitioner's claim was inappropriate under a disparate impact theory since it challenged a discretionary review policy where "members of the protected class were evaluated and ranked at different times, by different decision-makers, based on different considerations or criteria, as part of a multi-layered selection process." Brief in Opposition, No. 03-349, *Thweatt v. Electronic Data Systems Corp.*, at 11. Unlike the "process" at issue in *Thweatt*, the Pay Plan at issue here was non-discretionary and assigned petitioners to steps within the new pay scale based solely on their tenure and their current salary.

As the effects of this employment practice can be precisely measured in monetary terms, petitioners had little difficulty performing the kind of statistical analysis required for a disparate impact claim. Indeed, the ability to consider the statistical effect of the Pay Plan on the protected class, without reference to respondents' possible motivations for changing its policy, makes this case an ideal vehicle to consider the disparate impact claim as distinct from the disparate treatment claim.

IV. The Fifth Circuit's Decision Is Wrong on the Merits.

Congress enacted Title VII in 1964 to forbid employers to "fail or refuse to hire or to discharge any individual, or

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *." 42 U.S.C. 2000e-2(a)(1). In 1971, this Court held that Title VII's language authorizes both disparate impact and disparate treatment claims for employment discrimination. *See Griggs*, 401 U.S. at 431. In 1967, Congress used precisely the same language in drafting the Age Discrimination in Employment Act, merely substituting the word "age" for the words "race, color, religion, sex, or national origin." 29 U.S.C. 623(a)(1). Three circuit courts have correctly held that the text of the ADEA, like the identical text of Title VII on which it was based, authorizes both disparate impact and disparate treatment claims.

Congress' intent in enacting the ADEA can only be effected by recognizing disparate impact claims. The Act was passed to combat subtle age discrimination "based in large part on stereotypes unsupported by objective fact." *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). Disparate impact claims are particularly appropriate to target these sorts of subtle employment biases. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988) (noting that Title VII disparate impact claims need not be limited to "cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination"). Limiting the ADEA only to disparate treatment claims would fall far short of Congress' goal of eradicating subtle discrimination against employees age forty and older, since disparate treatment claims fail "[u]nless it is proven that an employer intended to disfavor the plaintiff *because of* his membership in a protected class." *Watson*, 487 U.S. at 1002 (emphasis added).

The provision of the ADEA principally relied on by the Fifth Circuit majority, 29 U.S.C. 623(f), does not call for a different result. That provision exempts from the Act otherwise invidious differentiation that is "based on reasonable factors other than age." To be sure, that language,

as the majority noted, bears some similarity to the Equal Pay Act's exception for "any other factor other than sex," 29 U.S.C. 206(d)(1)(iv), which has been interpreted by this Court to prohibit disparate impact claims under the EPA. *County of Washington v. Gunther*, 452 U.S. 161, 169-71 (1981). However, as Judge Stewart correctly noted in his dissent, "the flaw in the majority's logic is that the terms 'any' and 'reasonable' are not synonymous." Pet. App. 32a. A more appropriate interpretation of the "reasonable factors other than age" provision would render it a defense to liability, much like a showing of "business necessity" can negate a prima facie claim of disparate impact in a Title VII case. *See* 42 U.S.C. 2000e-2(k)(1)(A)(i). *See also Griggs*, 401 U.S. at 431.

The conclusion that disparate impact claims are cognizable under the ADEA is reinforced by the Equal Employment Opportunity Commission's settled interpretation of the Act. The EEOC's interpretation is owed deference, as it is the executive agency charged with enforcing the Act. *See* 29 U.S.C. 625 (noting transfer of the enforcement authority from the Secretary of Labor to the EEOC by Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978)). The EEOC has stated that "[w]hen an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. 1625.7(d). This interpretation, which has remained constant for more than two decades, was specifically drafted "to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessify." 46 Fed. Reg. 47,724 (Sept. 29, 1981).

Because this interpretation is set forth in a published regulation that was the product of formal notice-and-comment rulemaking—a fact the court below ignored, treating it as

though it were simply an informal, internal agency guideline, Pet. App. 10a n.5—it is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).[4] *See* 46 Fed. Reg. 47,724 (describing the notice-and-comment proceedings for 29 C.F.R. 1625.7(d)). Even if *Chevron* were inapplicable, however, considerable deference would still be due. This Court has squarely held that EEOC interpretive guidelines are entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 (2002). The court of appeals wrongly suggested that no deference at all is due—indeed, that the guidelines need not even be treated as having "persuasive force"—because EEOC did not "thoughtfully consider[]" its interpretation but instead simply "assumed" the disparate impact theory was available.

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[4] The ADEA, unlike Title VII, provides the EEOC with authority to promulgate substantive rules and regulations to carry out the statute. *Compare* 29 U.S.C. 628 (permitting the EEOC to "issue such rules and regulations as it may consider necessary or appropriate for carrying out [the ADEA]") *with* 42 U.S.C. 2000e-12(a) (permitting the EEOC "to issue * * * suitable *procedural* regulations to carry out [Title VII]") (emphasis added). The Commission's interpretative regulations under the ADEA are therefore distinct from the more limited interpretative guidelines that the EEOC may issue under Title VII. Thus, this Court's previous refusal to provide *Chevron* deference to the EEOC guidelines interpreting Title VII, *see, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002), is inapposite both because the agency's powers under the two statutes differ and because the Title VII guidelines were not a product of notice-and-comment rulemaking like the ADEA regulations at issue here. Thus, the courts of appeals have applied *Chevron* deference to EEOC's interpretations of the ADEA in numerous cases, *see, e.g., Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1099-1100 (CA9 1994) (giving Chevron to EEOC interpretation of the ADEA); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (CA7 1994) (same).

Pet. App. 10a n.5. This suggestion flatly ignores the notice-and-comment procedures EEOC employed, as well as the fact that the agency has maintained its interpretation consistently for twenty years notwithstanding the unspecified "subsequent developments" to which the court of appeals obliquely referred. *Id.*

Even had it not sought public comment, EEOC's own substantial expertise would render its interpretations "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. *See Griggs*, 401 U.S. at 434 (giving "great deference" to the EEOC's interpretation of federal employment law); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (relying on the EEOC's guidelines to interpret the scope of the bona fide occupational qualification exception to the ADEA). This Court has held that consistent, long-held agency interpretations merit particularly deferential treatment under *Skidmore*. *See, e.g., Alaska Dep't of Env'tl Conservation v. EPA*, __ U.S. __, 72 U.S.L.W. 4133 (holding that because petitioner's arguments "do not persuade us to *reject as impermissible* EPA's longstanding, consistently maintained interpretation," that interpretation, as embodied in an interpretive guideline, must be upheld (emphasis added)). Moreover, EEOC's interpretations of its own regulations, such as those contained in 46 Fed. Reg. 47,724, are of course entitled to a very high degree of deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation—even one presented only in a legal brief—is "controlling unless plainly erroneous or inconsistent with the regulation" (quotation marks omitted)).

* * * *

Unless settled by this Court, this intractable and widely acknowledged split among the courts of appeals will continue to produce results that arbitrarily differ according to the jurisdiction in which ADEA cases are litigated. As a prototypical disparate impact claim that challenges a

particular employment practice through the use of statistical analysis, this case would serve as an ideal vehicle to examine whether such claims are actionable under the ADEA. Finally, the decision reached by the court below incorrectly barred petitioners' disparate impact claims, and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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February 10, 2004[5]

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60850.

AZEL P. SMITH; JACQUELINE BUTLER; RUTHIE PORTER;
GLORIA BURNS;
WILLIE ALLEN; ET AL., PLAINTIFFS-APPELLANTS

v.

CITY OF JACKSON, MISSISSIPPI; POLICE DEPARTMENT OF THE
CITY OF JACKSON,
MISSISSIPPI, DEFENDANTS-APPELLEES.

Argued and Submitted:
Opinion Filed: Nov. 13, 2003
Opinion Revised: Dec. 4, 2003

Appeal from the United States District Court for the Southern
District of Mississippi;
William H. Barbour, District Judge, Presiding, D.C. No. 3:01-
CV-367-BN

Before KING, Chief Judge, and HIGGINBOTHAM and STEWART, Circuit Judges.

Opinion by Chief Judge KING; Concurrence in part and dissent in part by Judge STEWART.

OPINION

KING, Chief Judge.

Plaintiffs-appellants, thirty police officers and public safety dispatchers employed by the defendants-appellees, the City of Jackson and the Police Department of the City of Jackson, appeal the district court's order granting summary judgment in favor of the defendants. The appeal presents an issue of first impression in our circuit regarding whether a disparate impact theory of liability is available to plaintiffs suing for age discrimination under the Age Discrimination in Employment Act of 1967. The district court ruled that, as a matter of law, claims of disparate impact cannot be brought under the Act. We agree and therefore affirm the judgment of the district court as to this issue. However, because the district court granted summary judgment in favor of the defendants on the plaintiffs' disparate treatment claim before addressing pending motions related to the plaintiffs' ability to fully develop the summary judgment record, we vacate the district court's final judgment insofar as it dismissed the plaintiffs' disparate treatment claim.

I. PROCEDURAL HISTORY

On May 14, 2001, thirty police officers and public safety dispatchers—all over the age of forty and all employed by the defendants—filed suit pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (2000). They claimed injuries as a result of an allegedly age- discriminatory performance pay plan ("the

plan") implemented by the defendants in order to grant substantially larger salary increases to police officers and public safety dispatchers (collectively "officers") under the age of forty. The plan was implemented by the defendants on October 1, 1998, and revised by the defendants on March 1, 1999. Under the plan, those officers and dispatchers with five or fewer years of tenure with the department received proportionately greater raises when compared to their former pay than those with more than five years of tenure. As stated by the district court:

> The plan accordingly created three categories for the purposes of the analysis of this case: 1) those officers and dispatchers with less than five years of tenure, most, if not all, of whom would have been under 40 years of age; 2) those 40 years of age or older, most, if not all, of whom would have had more than five years of tenure, and; 3) those under 40 years of age with more than five years of tenure.

On December 11, 2001, the plaintiffs moved to compel certain fiscal and personnel discovery related to the implementation and revision of the plan; the magistrate judge overseeing disputes related to discovery in this matter granted this motion on January 16, 2002, concluding that "the fiscal and personnel discovery requested by the Plaintiffs is not privileged ... and should be produced." On June 5, 2002, the plaintiffs filed a "motion for sanctions, a default judgment, attorneys' fees and expenses, expert witness fees and a continuance," seeking to have the defendants comply with disclosure and discovery obligations as set forth in the Federal Rules of Civil Procedure and the order of the magistrate judge. Two days later, the defendants moved for summary judgment, and the plaintiffs thereafter moved to strike certain exhibits to the defendants' motion, in part because the existence of the documents attached as exhibits

had been previously denied by the defendants.

On September 6, 2002, while the plaintiffs' motions were pending, the district court granted summary judgment in favor of the defendants on the plaintiffs' disparate impact and disparate treatment claims and denied the plaintiffs' pending motions as moot. Final judgment was entered on this same date.

The plaintiffs appeal this final judgment, maintaining that: (1) the district court erred in concluding that a disparate impact theory of liability is not cognizable under the ADEA, and (2) the district court erred in improvidently dismissing the plaintiffs' disparate treatment claim pending production by the defendants of requested discovery materials.

II. STANDARD OF REVIEW

We review the grant of summary judgment *de novo*, applying the same standards as did the district court. *Daniels v. City of Arlington*, 246 F.3d 500, 502 (5th Cir.), *cert. denied*, 534 U.S. 951 (2001). Summary judgment should be granted if there is no genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In determining if there is a genuine issue of material fact, this court reviews the evidence in the light most favorable to the non-moving party. *Daniels*, 246 F.3d at 502.

III. THE PLAINTIFFS' DISPARATE IMPACT CLAIM

The plaintiffs raise both disparate treatment and disparate impact theories of liability here. Regarding their disparate treatment claim, the plaintiffs allege that the defendants were motivated by age to implement a plan that discriminated against them intentionally. Regarding their disparate impact theory, the plaintiffs allege that the implementation of the facially neutral plan by the defendants

gives rise to liability without a showing of intentional age motivation because the plan resulted in pay increases to officers under forty years of age that were four standard deviations higher than the raises received by officers over forty. In support of their disparate impact theory, the plaintiffs proffered to the district court statistical data demonstrating that the average pay increases made pursuant to the plan differed by age and that older officers received smaller raises than their younger counterparts.

In a disparate treatment case, liability depends on whether the protected trait—here, age—actually motivated the employer's decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). The employer may have relied on a facially discriminatory policy requiring adverse treatment of older employees or may have been motivated by age to discriminate against an individual on an ad hoc basis—"[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.* Proof of discriminatory motive is thus critical to the success of a plaintiff's discriminatory treatment claim. *Id.* In contrast, in a disparate impact case, liability may result without a demonstration of discriminatory motive. *Id.* at 609. Disparate impact claims arise from "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15 (1977)).

In 1971, the Supreme Court held that plaintiffs may bring disparate impact claims under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). This judicial construction of the statute was codified by Congress in 1991 to make clear that such a theory was available to plaintiffs. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a),

105 Stat. 1071, 1074-75 (adding 42 U.S.C. § 2000e-2(k)).[1] The availability of a disparate impact theory under the ADEA, however, is not so clear. In *Hazen Paper Co. v. Biggins*, the Supreme Court expressly declined to weigh in on whether the ADEA entitles a plaintiff to bring a disparate impact cause of action, stating that "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." 507 U.S. at 610 (internal citation omitted).

This express reservation has led to a debate amongst the courts of appeals regarding whether the ADEA, like Title VII, entitles a plaintiff to bring a disparate impact claim. Those courts of appeals extending the holding in *Griggs* to the ADEA do so based on the textual similarities between the prohibitory sections of the ADEA and Title VII. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir.2000) (stating, post-*Hazen*, that "[w]e see no reason to depart from our conclusion ... and we again hold that a disparate impact claim is cognizable under the ADEA"); *Criley v. Delta Air Lines Inc.*, 119 F.3d 102, 105 (2d Cir.1997) (following, without discussion, pre-*Hazen* law in stating that "in our circuit, we have recognized such a [ ] [disparate impact] action"); *Smith v. City of Des Moines*, 99 F.3d 1466, 1470

[1] We note that the same statute did not make a parallel amendment to the ADEA, although it did amend the ADEA in other ways. Some of our sister circuits have concluded that this omission (together with other factors) indicates a congressional intent that a disparate impact cause of action not be available under the ADEA. *See Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir.1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir.1996). Such congressional inaction is susceptible of multiple interpretations, however, and so we should hesitate before we draw inferences from it. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). The Civil Rights Act of 1991 was mainly aimed at overriding certain interpretations of Title VII, and so we do not find it especially probative with respect to the question before us today. Accordingly, our interpretation of the ADEA, set forth later in this opinion, rests on other grounds.

(8th Cir.1996) (stating that "even if we believed that *Hazen Paper* cast doubt on the validity of [pre-*Hazen* case law], *Houghton* [a post-*Hazen* case] represents the law of this Circuit" and must therefore be followed). Those courts of appeals declining to hold that a disparate impact theory is cognizable under the ADEA recognize the significant textual overlap in the prohibitory sections of the ADEA and Title VII, but they also look beyond this similarity, examining the entire ADEA statute (and the purpose behind its enactment) and finding important differences between the ADEA and Title VII that counsel against extending the *Griggs* holding to the ADEA context. *See Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1325-26 (11th Cir.) (holding that disparate impact claims may not be brought under the ADEA, in part because "the history of the ADEA differs from the legislative history of Title VII, which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact"), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed*, 535 U.S. 228 (2002); *Mullin*, 164 F.3d at 703 ("Congress never intended to make a disparate impact cause of action available under the ADEA."); *Maier v. Lucent Tech., Inc.*, 120 F.3d 730, 735 (7th Cir.1997) ("[S]uch a theory of liability [disparate impact] is not cognizable under the ADEA."); *Ellis*, 73 F.3d at 1001 ("[W]e hold that ADEA claims cannot be based on a disparate impact theory of discrimination.").[2]

After surveying the well-traversed arguments on either side of this debate, we hold that the ADEA was not intended

[2] After *Hazen*, the Third and the Sixth Circuits have both expressed "considerable doubt" regarding whether a claim of age discrimination may be stated under a disparate impact theory. *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n. 5 (6th Cir.1995) ("The Court's focus in *Hazen Paper* on Congress's intent to prevent discrimination based on inaccurate and damaging stereotypes suggests that incidental discriminatory effects arising from facially age- neutral policies are not redressable."); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.1995) (opinion of Greenberg, J.) (stating that "the analysis in *Hazen* casts considerable doubt on the viability of the theory"). However, in neither case was the issue directly before the court.

to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age. Fundamental to our decision is the ADEA's express exception permitting employer conduct based on "reasonable factors other than age"--an exception absent from Title VII--and the inapplicability to the ADEA context of the policy justifications identified by the Supreme Court (in *Griggs*, 401 U.S. at 430-31) for recognizing a disparate impact cause of action in the Title VII context.

A. Similarities Between the ADEA and Title VII

The construction of a statute begins with the text of the statute itself. The ADEA prohibits discrimination on the basis of age. *See* 29 U.S.C. § 623 (2000). It was enacted in 1967, before the Supreme Court first interpreted Title VII to allow employees to prove discrimination by showing disparate impact. *See Griggs*, 401 U.S. at 431. The plaintiffs correctly identify the core sections expressly prohibiting discrimination "because of [an] individual's age" in the ADEA--§ 623(a)(1) and (a)(2)--as overlapping almost identically with the core sections expressly prohibiting discrimination "because of [an] individual's race, color, religion, sex, or national origin" in Title VII--42 U.S.C. § 2000e-2(a)(1) and (2).[3] This is no coincidence; "the

[3] Section 623's prohibitory subsections provide, in relevant part, that it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age....

prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). The only differences in the prohibitory language contained in these statutes are: (1) Title VII protects against discrimination on the basis of "race, color, religion, sex, or national origin," while the ADEA protects against discrimination on the basis of "age"; and (2) Title VII extends protection also to "applicants" for employment, while the ADEA does not.

Although the ADEA's prohibitory provisions are at first blush read most naturally as outlawing only conduct motivated by age--the statute refers to actions taken "because of" age--*Griggs* of course held that parallel language in Title VII prohibited actions that had a race-disparate impact, irrespective of motive or intent. The significant overlap between the prohibitory sections of the ADEA and of Title VII persuaded the Second Circuit to hold early on, with little discussion, that a disparate impact theory of liability is likewise available under the ADEA. *See Geller v. Markham*, 635 F.2d 1027, 1031-32 (2d Cir.1980).[4] The Eighth and

29 U.S.C. § 623(a)(1)-(2). The prohibitory subsections of Title VII provide, in relevant part, that it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)-(2).

[4] Then-Justice Rehnquist dissented from the denial of certiorari in *Geller*, 451 U.S. 945 (1981). In so doing, he stated that "[i]n my opinion, the decision of the Court of Appeals is inconsistent with the express provisions of the ADEA and is not supported by any prior decision of this Court." *Id.* at 947.

Ninth Circuits soon followed suit, again without any significant inquiry apart from drawing a parallel to Title VII. *See Leftwich v. Harris- Stowe State Coll.*, 702 F.2d 686, 690 (8th Cir.1983); *Douglas v. Anderson,* 656 F.2d 528, 531 n. 1 (9th Cir.1981).[5] As noted earlier, these circuits continue to follow that position.[6]

While the First, Seventh, Tenth, and Eleventh Circuits have likewise approached the statutory construction of the ADEA by looking at the text of the ADEA, they have (we think correctly) declined to limit their construction calculus solely to the prohibitory sections of the ADEA and Title VII. Instead, as we explore below, they look to the entire statute and legislative history of the ADEA to recognize important textual and policy-based differences between the ADEA and Title VII that demonstrate an intention on the part of Congress to allow for claims of intentional age discrimination, but not for claims of disparate impact discrimination.

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[5] At around the same time, the EEOC issued new interpretive guidelines for the conduct of ADEA cases. We note that one portion of those guidelines seems to be based on the assumption that the *Griggs* framework applies to ADEA cases. *See* 46 Fed. Reg. 47,724, 47,725 (1981) (Sept. 29, 1981) (amending 29 C.F.R. § 1625.7(d)). Such guidelines are not entitled to *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991). We are of course still bound to treat them as having persuasive force, to the extent that they are thoughtfully considered. *See Christensen*, 529 U.S. at 587. The guideline in question does not purport to affirmatively establish that a disparate impact theory is available. Instead, it simply assumes, on the basis of *Griggs*, that such a theory is available. *See* 46 Fed. Reg. at 47,725. Given the absence of significant analysis, and in light of subsequent developments that have cast doubt on that assumption, we do not believe that this administrative guidance is convincing authority.

[6] The Seventh Circuit, which had originally permitted disparate impact suits under the ADEA, changed course after *Hazen*. *See EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir.1994).

B. Differences Between the ADEA and Title VII

(1) Section 623(f)(1) of the ADEA

The ADEA's prohibitions against age discrimination in employment are qualified by several exceptions to employer liability set forth in § 623(f). Pursuant to one of these exceptions, an employer can avoid liability under the ADEA if the adverse employment action is "based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).[7]

Neither the "reasonable factors other than age" exception nor a parallel provision is found in Title VII. Facially, the exception appears to serve as a safe harbor for employers who can demonstrate that they based their employment action on a reasonable non-age factor, even if the decision leads to an age- disparate result. In a pre-*Hazen* dissenting opinion, Judge Easterbrook argues against recognizing a disparate impact theory of liability under the ADEA based on this "reasonable factors other than age" exception:

> [Section (f)(1)], which says that "reasonable factors other than age" may be the basis of decision--impl[ies] strongly that the employer may use a ground of decision that is not age,

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[7] Section 623(f)(1) provides, in relevant part:

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age....

29 U.S.C. § 623(f)(1).

> even if it varies with age. What else could be the purpose of this language? Surely it does not mean simply that "only age discrimination is age discrimination." "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir.1987) (Easterbrook, J., dissenting) (quoting Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & CONTEMP. PROBS. 53, 55 (1986)). Post-*Hazen* case law likewise reads the inclusion of the "reasonable factors other than age" exception to imply a congressional intent to remedy only intentional discrimination because of age through the passage of the ADEA. For example, the First Circuit states:

> A critical asymmetry in the texts of the ADEA and Title VII counsels convincingly against recognizing a disparate impact cause of action under the former statute.... This ["reasonable factors other than age"] proviso permits employers to utilize factors other than age as grounds for employment-related decisions that differentially impact members of the protected class (individuals between the ages of 40 and 69). When this exception is read with the ADEA's general prohibition against age-based discrimination, the resulting construction follows: it shall be unlawful to "discriminate against any individual ... because of such individual's age," except when "based on ... factors other than age." Thus, if the exception contained in section 623(f)(1) is not understood to preclude disparate impact

> liability, it becomes nothing more than a bromide to the effect that "only age discrimination is age discrimination."

Mullin, 164 F.3d at 701-02. We too find that the inclusion of the "reasonable factors other than age" exception to the ADEA creates a critical "asymmetry" between the ADEA and Title VII.[8] The addition of this broad exception to the ADEA, on its face, appears to preclude a disparate impact theory of liability under the ADEA; at a minimum, it amounts to a salient textual difference between the substantive liability provisions of the ADEA and Title VII--a difference not mentioned by any of the courts of appeals which have extended *Griggs* to the ADEA context.[9]

While we believe that the "reasonable factors other than age" provision counsels against recognizing a disparate impact theory under the ADEA, we would not go so far as to

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[8] In his dissent from the denial of certiorari in *Geller*, then- Justice Rehnquist likewise focused on § 623(f)(1) to support his view that Congress did not intend that a disparate impact claim be cognizable under the ADEA:

> In my view, Congress did not intend the ADEA to have the restraining influence on local governments which will result from the decision below. Congress revealed this intention in 29 U.S.C. § 623(f)(1), which provides that it shall not be unlawful for an employer to take any action otherwise prohibited "where the differentiation is based on reasonable factors other than age."

Geller, 451 U.S. at 948-49 (Rehnquist, J., dissenting from denial of cert.).

[9] This difference between the statutes also means that the rule of *in pari materia*, heavily relied upon by our colleague in dissent, is largely inapplicable to this case. For while we usually endeavor to give like language the same meaning, it is a cardinal rule of statutory interpretation that we are to consider the whole act, reading each section in light of the others. *E.g.,United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme....").

say that it rules out any alternative reading. As the dissent argues, the prohibitory section and the "reasonable factors other than age" clause could together be read as announcing a general rule that disparate impact is actionable but then carving out a defense for adverse impacts that can be justified as a business necessity. The dissent's position is, of course, essentially how the courts have treated claims under Title VII. We do not believe this course is open to us, however. This circuit long ago held that § 623(f)(1)'s "reasonable factors other than age" provision does not create an affirmative defense to liability; rather, it allows the defendant to bring forward evidence to negate the plaintiff's prima facie case. *See Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590-91 (5th Cir.1978). Furthermore, whether or not § 623(f)(1) is technically treated as a defense, we do not think that the reference to "reasonable factors other than age" can be taken to mean that all practices having a disparate impact are illegal unless they meet the stringent requirements of "business necessity." Indeed, the Supreme Court has suggested a different meaning for the clause, stating that it "insure[s] that employers [are] permitted to use *neutral criteria not directly dependent on age*." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983) (emphasis added); *cf. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) ("The exception simply makes clear that '[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.'" (quoting *Hazen*, 507 U.S. at 611)). Therefore, we would not read the "reasonable factors other than age" clause as a limited derogation from a general prohibition against disparate impact. Instead, we believe that the soundest reading of the whole text is that the ADEA does not prohibit employers from taking actions based on non-age factors, except when those non-age factors are so related to age that they are mere proxies.[10] This reading of the text is also

[10] In order to resolve this case, we need not speculate on what such factors might be. The Supreme Court held in *Hazen* that adverse employment actions based on job tenure do not, without more, amount to disparate treatment based on age. 507 U.S. at 611-12.

powerfully supported by the legislative history, to which we turn in Part III.B.2 of our opinion.

The conclusion that this "reasonable factors other than age" exception textually precludes a disparate impact theory of liability under the ADEA is arguably strengthened by the Supreme Court's treatment of a similar exception to the Equal Pay Act. The Equal Pay Act was originally enacted in 1963 (as an amendment to the Fair Labor Standards Act) to prohibit discrimination in wages based on gender. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Under subsection (d), entitled "Prohibition of sex discrimination," in Title 29, section 206, the Equal Pay Act contains an exception similar to the "reasonable factors other than age" exception found in the ADEA:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex ... except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex: Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (emphasis added). The Supreme Court has interpreted this exception to preclude actions based on

disparate impact theories under the Equal Pay Act. *See County of Washington v. Gunther,* 452 U.S. 161, 169-71 (1981); *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 710 (1978). For example, in *Manhart,* a class action was brought on behalf of female employees of the Los Angeles Department of Water and Power challenging the Department's requirement that female employees make larger contributions to its pension fund than male employees. 435 U.S. at 704. The requirement was based on a study of mortality tables which revealed that, on the average, the Department's female employees lived a few years longer than its male employees. *Id.* at 705. In footnote 20, Justice Stevens, writing for the Court, interpreted the "any factor other than sex" exception to the Equal Pay Act:

> A variation on the Department's fairness theme is the suggestion that a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees. *Cf. Griggs v. Duke Power Co.,* 401 U.S. 424. This suggestion has no force in the sex discrimination context because each retiree's total pension benefits are ultimately determined by his *actual life span*; any differential in benefits paid to men and women in the aggregate is thus "based on [a] factor other than sex," and consequently immune from challenge under the Equal Pay Act....

Id. at 710 n.20 (alteration in original).

The Court's willingness to find that the Equal Pay Act's "any factor other than sex" exception precludes disparate impact theories of liability under the Equal Pay Act is helpful to our statutory construction of the ADEA. Many provisions in the ADEA have their roots in the Fair Labor Standards Act and the Equal Pay Act. *See, e.g., Lorillard,*

434 U.S. at 577-82 (discussing the Fair Labor Standards Act as the "model" for the enforcement and remedial provisions to the ADEA). Although legislative history on § 623(f)(1) is slim, we find it likely that the ADEA's "reasonable factors other than age" exception was spawned from the Equal Pay Act's "any factor other than sex" exception, especially given that no parallel exception is found in Title VII.[11]

We recognize that the exceptions found in the ADEA and the Equal Pay Act are not identical. The most notable difference, emphasized by our colleague in dissent, is the inclusion of the word "reasonable" in the ADEA's exception. However, we, like the Eleventh Circuit in *Adams,* decline to infer from the inclusion of the word "reasonable" that Congress meant to create an implicit background rule that actions resulting in an age-disparate impact are as a general matter proscribed. *See* 255 F.3d at 1325 n.6. As we explained above, we believe the better reading is not that the clause acts as a limited defense against disparate impact claims but rather that the clause signals that impacts resulting from neutral criteria not directly dependent on age are not prohibited in the first place. At the very least, we recognize the "reasonable factors other than age" exception as a clear textual difference between the ADEA and Title VII regarding employer liability--a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate

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[11] *See* Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That Is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act,* 31 U. RICH. L. REV. 819, 833-34 (1997) ("Note the similarity of the Equal Pay Act and ADEA 'factor other than ...' defenses. Guess the origins.... Until the mid-1970s the Secretary of Labor administered and enforced the Equal Pay Act. The Secretary of Labor was charged by Congress ... to prepare a report on age discrimination and recommend legislation to Congress. The initial drafts of what eventually became the ADEA were thus prepared by the Secretary of Labor.... It would seem, therefore, that the Secretary who was then enforcing the Equal Pay Act, lifted language and concept from the Equal Pay Act and placed it in the ADEA.").

impact claim under Title VII (as set forth in *Griggs*) controls the cognizability of a disparate impact claim under the ADEA.[12]

(2) Legislative History and Policy Considerations

In addition to the § 623(f)(1) exception to the ADEA, strong policy considerations, revealed in the legislative history of the ADEA, underscore the differences between the ADEA and Title VII. Because the broad remedial purpose behind Title VII was central to the Court's statutory construction of Title VII in *Griggs*, the difference between the purposes behind the ADEA and Title VII is directly relevant to whether a disparate impact theory is cognizable under the ADEA.

Congress enacted the ADEA after receiving a 1965 report by the Secretary of Labor regarding the problems of older workers. *See EEOC v. Wyoming*, 460 U.S. at 230-31.

[12] Before turning to the legislative history of the ADEA, we note that we do not share the dissent's view of the import of the Older Workers Benefit Protection Act, Pub.L. No. 101-433, 104 Stat. 978 (1990) ("OWBPA"). The OWBPA added a provision to the ADEA requiring employers in certain circumstances to provide laid off employees with data relating to the ages of employees who are laid off versus those who retain their jobs. *See* 29 U.S.C. § 626(f). According to the dissent, such statistics would have little use if the ADEA did not allow a disparate impact cause of action. We would not draw that inference, however, for such statistical evidence is quite useful in disparate treatment cases. *See Teamsters*, 431 U.S. at 339; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1285 (5th Cir. 1994). Moreover, the legislative history of the OWBPA shows that Congress believed that such statistics would help to alert discharged employees to the possibility that they might have suffered disparate *treatment* based on age. *See* H.R. REP. NO. 101-664, at 22 (1990) (expressing the concern that in large-scale layoffs, "an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force").

For our purposes, it is significant that the Secretary's report finds "no evidence of prejudice based on dislike or intolerance of the older worker" and concludes that the main problem older workers faced in the workplace was arbitrary age discrimination--namely explicit age limitations--based on misconceptions about the abilities of older workers. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 2, 6 (1965) (the "Report"), *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16 (1981) (hereinafter LEGISLATIVE HISTORY). The Report further specifically finds that the concept of age prejudice is unique and differs from the concept of race prejudice because the process of aging "is inescapable, affecting everyone who lives long enough," regardless of distinct social and economic environments. *Id.* at 6. The Report likewise distinguishes between "arbitrary discrimination" based on age and other institutional arrangements that have a disproportionate effect on older workers, finding that different solutions were appropriate for these different problems. *Id.* at 21-25; *see also Mullin*, 164 F.3d at 703 (describing the Report as "recommend[ing] that arbitrary discrimination be statutorily prohibited, but that systemic disadvantages incidentally afflicting older workers be addressed through educational programs and institutional restructuring").[13] These findings

[13] We recognize that the Report found that discriminatory practices were often "defended on grounds apparently different from their actual explanation." Report at 7. We disagree, however, with the dissent's conclusion that Congress therefore must have intended to create a cause of action for disparate impact. The practices to which the Report was referring were age limitations, a form of disparate treatment. *See id.* Age limitations were, in fact, the dominant form of arbitrary discrimination addressed in the Report. Such restrictions are "arbitrary," according to the Report, in that they are based on stereotype-driven assumptions about older workers rather than on older workers' actual abilities. *Id.* at 2, 8. When an employer's practices are motivated by neutral, non-age factors, however, "the problem of inaccurate and stigmatizing stereotypes

were "confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress" in conjunction with the enactment of the ADEA. *EEOC v. Wyoming*, 460 U.S. at 230-31.

On January 23, 1967, the Secretary transmitted to Congress proposed legislation entitled "Age Discrimination in Employment Act of 1967." Letter from W. Willard Wirtz to Hon. John W. McCormack and Hon. Hubert H. Humphrey, Jan. 23, 1967, *reprinted in* LEGISLATIVE HISTORY at 62-63. In this letter, the Secretary notes that the bill "provides for attention to be given to institutional arrangements which work to the disadvantage of older workers," but that "[r]easonable differentiations not based solely on age ... would not fall within the proscription" of the bill. *Id.* Instead, the Secretary recommended that "research ... be undertaken and promoted with a view to reducing barriers to the employment of older workers." *Id.* at 63. The Report, this proposed bill, and subsequent factfinding by the Executive Branch and Congress led Congress to limit the purpose of the ADEA specifically "to prohibit[ing] arbitrary age discrimination in employment." 29 U.S.C. § 621(b).

In contrast to the refined purpose evidenced in the historical underpinnings of the ADEA's enactment, the Supreme Court's opinion in *Griggs* discusses Title VII's broad *remedial* purpose. The defendant company in *Griggs* instituted a policy of permitting incumbent employees who lacked a high school education to qualify for transfer from the labor and coal handling department to an "inside" department by passing two tests of general intelligence--"[n]either [of which] was directed or intended to measure the ability to learn to perform a particular job or category of jobs." 401 U.S. at 427-28.. Prior to the effective date of Title VII, the defendant had instituted a policy of "restricting Negroes" to

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disappears." *Hazen*, 507 U.S. at 611. The mischief identified in the Report is therefore more accurately targeted by a disparate treatment theory, not a disparate impact theory.

the labor and coal handling department in 1965. *Id.* at 427.

Chief Justice Burger, writing for the Court, held that Congress's objective in enacting Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30. Based on this objective, the Court held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

The cornerstone of *Griggs* 's holding that disparate impact is cognizable under Title VII is thus the link between the history of educational discrimination on the basis of race and the use of that discrimination to continue to disadvantage individuals on the basis of their race. *Id.* at 432 (stating that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability"); *see also Gunther*, 452 U.S. at 178 (describing the "broad approach" of Title VII as aimed at "overcoming and undoing the effect of discrimination") (internal quotation marks omitted). However, absent from the scope of the ADEA are the historical and remedial concerns that, in the Title VII context, led to the recognition of disparate impact claims directed at overcoming the consequences of past societal discrimination.

As Justice Stevens explained in his concurring opinion in *Washington v. Davis*, 426 U.S. 229 (1976), it is "inappropriate simply to transplant ... standards in their entirety into a different statutory scheme having a different history." *Id.* at 255 (Stevens, J., concurring). We heed this advice today and therefore follow the majority of circuit courts to have addressed this issue in holding that a disparate impact theory of liability is not cognizable under the ADEA. We find insufficient textual support for the recognition of a disparate impact theory of liability in the ADEA. Further, as

we see it, the conclusion that the holding in *Griggs* should be extended to the ADEA context based on the similarities in the prohibitory sections of the ADEA and Title VII ignores important considerations. It ignores the existence of § 623(f)(1)--an express exclusion of employer liability that is present in the ADEA but not present in parallel form in Title VII--and it ignores the differing purposes behind the ADEA and Title VII.[14]

IV. THE PLAINTIFFS' DISPARATE TREATMENT CLAIM

In contrast to the plaintiffs' disparate impact claim,

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[14] Although it was not essential to the Court's holding in *Hazen Paper Co.*, there is language in the opinion that supports our conclusion that a disparate impact claim is not cognizable under the ADEA. There, a discharged employee (who was 62) brought suit against his employers after they discharged him only a few weeks before his pension rights were to vest, contending that the employers' decision was motivated by his age. 507 U.S. at 606. The First Circuit affirmed the judgment for the plaintiff employee, entered by the district court consistent with the jury verdict in favor of the employee. *Id.* at 607. In so doing, the court of appeals gave "considerable emphasis" to the evidence of pension interference because, in the court of appeals's view, the jury could reasonably have found that age was inextricably intertwined with the decision to fire the employee before his pension rights vested. *Id.* The Supreme Court vacated this judgment. *Id.* at 617. Importantly, the employee did not base his claim for relief on a disparate impact theory of liability. *Id.* at 610. Nonetheless, in holding that "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service," *id.* at 613, the Court stated that "[d]isparate treatment ... captures the essence of what Congress sought to prohibit in the ADEA." *Id.* at 610. Further, the Court specifically discussed the decided purpose of the ADEA--i.e., to prevent "arbitrary" discrimination based on inaccurate stereotyping regarding older workers: "When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* at 611 (emphasis omitted).

the plaintiffs' disparate treatment claim is cognizable under the ADEA.

A. McDonnell Douglas Framework

We have interpreted the now-familiar *McDonnell Douglas* framework to apply to disparate treatment claims brought under the ADEA. *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 395 (5th Cir.2002). To make out a prima facie case of discriminatory treatment based on age, the plaintiffs are required to prove: (1) they are within the protected class; (2) they are qualified for the position; (3) they suffered an adverse employment decision; and (4) they were replaced by someone younger or treated less favorably than similarly situated younger employees (i.e., suffered from disparate treatment because of membership in the protected class). *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir.2002); *see also Kelliher v. Veneman*, 313 F.3d 1270, 1275 (11th Cir.2002).

If the plaintiffs make out their prima facie case, then the burden of production shifts to the defendants to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Tyler*, 304 F.3d at 395. If the defendants meet this burden of production, the inference of discrimination drops, and the plaintiffs may then attempt to prove discrimination by offering evidence that the defendants' stated reason is pretextual. *Id.* ("In a disparate treatment case ... a plaintiff must produce sufficient evidence to rebut a showing by the employer that there was a legitimate, non-discriminatory reason for [differentially treating] a particular employee.").

Here, the district court dismissed the plaintiffs' disparate treatment claim because the plaintiffs could not make out their prima facie case based on the evidence available to them at the time their responsive briefing was filed. The district court cited this evidence as consisting of: (1) evidence that the Personnel Director for the City of

Jackson, Dr. George Terry, represented that the plan considered tenure only once; and (2) evidence that certain officers were subjected to age-related comments by Dr. Terry, Officer Deric Hearn, and Deputy Chief Cleon Butler. The district court additionally held that the plaintiffs' evidence, as a matter of law, was insufficient to disprove the defendants' legitimate nondiscriminatory reasons for their employment decision--to bring starting salaries for police officers up to the regional average, to develop a more generous pay scale within the confines of the city budget, and to consider tenure in the pay scale.

B. The Plaintiffs' Pending Motions

When the district court dismissed the plaintiffs' disparate treatment claim, two motions were pending: (1) a "motion for sanctions, a default judgment, attorneys' fees and expenses, expert witness fees and a continuance," filed by the plaintiffs on June 5, 2002; and (2) a "motion to strike exhibits to defendants' motion for summary judgment," filed by the plaintiffs on July 11, 2002.

The June 5, 2002, motion sought comparative wage data relating to the plan, as originally implemented in October 1998 and as revised in March 1999. It also sought to compel disclosure of any related fiscal and personnel discovery in accordance with the order of the magistrate judge granting the plaintiffs' motion to compel. Finally, the motion sought a continuance of the discovery period in order to allow the defendants to produce discovery materials previously requested and to allow the plaintiffs an opportunity to further develop their case based on this new evidence.

The July 11, 2002, motion sought to strike certain exhibits from the defendants' motion for summary judgment, in part because as to certain of these data produced as exhibits, "[t]he counsel for the Defendants [had] insisted that no such wage data existed," and "these data's purported existence and importance were never provided to the

Plaintiffs until it was utilized by an Expert for the Defense."

Curiously, the district court did not rule on these motions. Instead, in deciding to grant the defendants' motion for summary judgment, the district court simply considered the evidence available to the plaintiffs at the time of their responsive briefing. After granting summary judgment in favor of the defendants as to the plaintiffs' disparate treatment claim, the court then disposed of the plaintiffs' pending motions by stating that "[b]ecause the Court finds that Plaintiffs cannot meet their burden of proof for claims of disparate treatment under the ADEA, the other motions of Plaintiffs in opposition to the Motion of Defendant for Summary Judgment related to claims for disparate treatment are moot."

On appeal, the plaintiffs contend that the dismissal of their disparate treatment claim was premature because they "were not allowed to enforce their requests for discovery or to complete scheduled depositions that had been recessed when the plaintiffs learned that significant information had been willfully withheld from them."

C. Analysis of the District Court's Conclusions

The district court may have conflated the plaintiffs' burdens of production and persuasion in concluding that the plaintiffs failed to meet their burden of demonstrating a genuine fact issue regarding their disparate treatment claim.[15]

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[15] For example, although not ultimately relevant to our determination on appeal, the district court required that the plaintiffs prove, as part of their initial prima facie burden, "unlawful motive" to discriminate because of age instead of requiring that the plaintiffs demonstrate replacement by someone younger or differential treatment of younger, similarly situated officers. *See Sandstad*, 309 F.3d at 897. The district court also appears to have used pre-*Reeves* case law in discussing the plaintiffs' ultimate burden of proving unlawful discrimination under the ADEA. *See, e.g., Ross v. Univ. of Tex. at San Antonio*, 139 F.3d 521, 525 (5th Cir.1998). As the Supreme Court stated in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000), "a plaintiff's prima facie case, combined with

However, we need not address this issue because, upon review, we agree with the plaintiffs that summary judgment on the plaintiffs' disparate treatment claim was premature in light of the plaintiffs' pending motions before the district court, particularly given the allegation included in these motions that the defendants have failed to comply with the order of the magistrate judge.

The magistrate judge clearly ordered the defendants to turn over various discovery documents, including documents that were responsive to the plaintiffs' initial disclosure request. These documents apparently include the working papers used by city officials in drafting the new and revised plans, as well as evidence regarding comparative wage data--including memoranda and other documentation related to the March 1, 1999, City of Jackson Pay Plan Revision, signed by all pertinent department heads, the existence of which was initially denied by the defendants. The plaintiffs allege that this evidence provides additional documentation verifying the extent of the disparity between wage increases for officers under the age of forty and officers over the age of forty. The plaintiffs also allege that this evidence provides them with documentation regarding the defendants' knowledge that, at least at the time the defendants revised the plan, the plan would result in inferior pay status for older workers when compared to younger workers. This evidence appears to us to be relevant to the plaintiffs' prima facie case and to their ultimate burden required to counter the defendants' proffered reasons for implementing the pay plan.[16] While much of this

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sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Further, the district court here apparently declined, without discussion, to consider any of the plaintiffs' evidence that the plan resulted in a disparity of four standard deviations between workers over forty and workers under forty. Such statistical evidence can be relevant to a claim of intentional discrimination. *See supra* note 12.

[16] Our ability to determine the degree to which this requested evidence will ultimately benefit the plaintiffs is made difficult by the absence in the

evidence relates primarily to the plaintiffs' now-dismissed disparate impact claim, the impact evidence may also support a permissible inference of intentional discrimination and, as the plaintiffs argue, may relate to whether one of the defendants' proffered justifications—to bring salaries up to the regional average—is false.

We do not decide whether the defendants have, in fact, failed to comply with the magistrate judge's order, whether the motion to continue discovery should be granted, or whether the plaintiffs' other pending motions have merit. Rather, we simply hold that the district court should have addressed these motions before it ruled, on an apparently incomplete summary judgment record, that the plaintiffs had not met their burden of demonstrating the existence of genuine fact issues regarding their disparate treatment claim. If the defendants did not comply with their discovery obligations such that the plaintiffs were prohibited from presenting their best case to the district court, summary judgment in favor of the defendants improperly denied the plaintiffs an opportunity to continue discovery and supplement the record. *Sunbelt Sav., FSB v. Montross,* 923 F.2d 353, 357, 358 (5th Cir.1991) (holding that summary judgment was premature when discovery was still pending).

The history of the discovery disputes plaguing this case and the existence of pending motions alleging that the plaintiffs' ability to present their best case was significantly hindered by the defendants' failure to comply with their discovery obligations convinces us that the summary judgment dismissal of the plaintiffs' disparate treatment claim was premature. On remand, the district court may want to take into account, in ruling on the pending motions, our decision on the viability of the disparate impact claim.

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record of the parties' briefs in support of and against the defendants' motion for summary judgment and the failure of the plaintiffs to request that these briefs be supplemented to the record on appeal.

V. CONCLUSION

We AFFIRM in part, VACATE in part, and REMAND the case to the district court. Costs shall be borne by appellees.

STEWART, Circuit Judge, concurring in part, dissenting in part:

While I agree with the majority's disposition of plaintiff's disparate treatment claim in Part IV of the opinion, I also believe that the district court erred in improvidently dismissing the plaintiff's disparate impact claim and, therefore, I must dissent with regard to Part III.

This marks the first time our court has had to squarely decide, in the aftermath of *Hazen Paper v. Biggins,* 507 U.S. 604 (1993), whether a disparate impact claim may be formulated under the ADEA. I, however, am not thoroughly convinced by the majority's attempt to distinguish between two statutes--the ADEA and Title VII--whose text is virtually the same, that Congress meant to imply a disparate impact claim to the latter, but to preclude such a claim in the former. Equally, I am not persuaded by the majority's emphasis on the "reasonable factors other than age" ("RFOA") exception. When Congress enacted the ADEA in 1967, the courts had yet to develop a disparate impact theory. Thus, at the time of enactment, it appears that Congress most likely intended the RFOA to apply solely to claims of disparate treatment. Based upon a close reading of the text, the relevant legislative history, subsequent legislative actions, and concerns of public policy, I submit that a proper interpretation of the ADEA allows a disparate impact cause of action.

I. STATUTORY INTERPRETATION OF THE ADEA

The majority's analysis begins with the premise that the RFOA exception of the ADEA facially appears as a safe

harbor to employers. To the majority, the language of the RFOA exception clearly rejects the theory of disparate impact. The majority relies in part on a pre-*Hazen* dissent by Judge Easterbrook in *Metz v. Transit Mix, Inc.,* for the proposition that the RFOA exception is "*incomprehensible* unless the prohibition forbids disparate treatment and the exception authorizes disparate impact." 828 F.2d 1202, 1220 (7th Cir.1987) (emphasis added).

Contrary to the majority's conclusion, it is not at all clear from the text that the RFOA exception *has no alternative interpretation* other than to preclude disparate impact. The RFOA exception aside, the language of the ADEA and Title VII are similar in every other respect. Thus, I cannot conclude, in the absence of expressed language to the contrary, that Congress meant to apply the disparate impact theory to Title VII, but not to the analogous language of the ADEA. Until the United States Supreme Court expressly rules on this issue, I continue to believe that the majority viewpoint is in error. Despite the obvious similarities between Title VII and the ADEA, today's majority joins our fellow courts of the First,[1] Third,[2] Sixth,[3] Seventh,[4] Tenth,[5] and Eleventh[6] Circuits in disclaiming a disparate impact theory under the ADEA.

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[1] *Mullin v. Raytheon Co.,* 164 F.3d 696, 702-04 (1st Cir.1999) *cert. denied,* 528 U.S. 811 (1999).

[2] *DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719, 732 (3d Cir.1995).

[3] *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union,* 53 F.3d 135, 139 n.5 (6th Cir.1995).

[4] *EEOC v. Francis W. Parker School,* 41 F.3d 1073, 1076-77 (7th Cir.1994).

[5] *Ellis v. United Airlines, Inc.,* 73 F.3d 999, 1006-07 (10th Cir.1996).

[6] *Adams v. Fla. Power Corp.,* 255 F.3d 1322, 1325 (11th Cir.2001).

As shown through persuasive precedent from other circuits, however, there is another side to this debate. For example, while acknowledging that post- *Hazen* the availability of disparate impact claims under the ADEA is unsettled among the circuits, the Second Circuit held that it "generally assesses claims brought under the ADEA identically to those brought pursuant to Title VII, including disparate impact." *Smith v. Xerox,* 196 F.3d 358, 367 n.5 (2d Cir.1999). The Second Circuit is not alone. The Eighth Circuit has also stated that it "continues to recognize the viability of ... [ADEA disparate impact] claims." *Lewis v. Aerospace Cmty. Credit Union,* 114 F.3d 745, 750 (8th Cir.1997); *See also EEOC v. McDonnell Douglas Corp.,* 191 F.3d 948, 950 (8th Cir.1999) (stating that "the law of this circuit is that disparate impact claims are cognizable under the ADEA"). Thus, precedent from other circuits show that a contrary facial interpretation of the RFOA is reasonable.

Moreover, the strongest argument against the language of the RFOA exception precluding disparate impact lies in the substantive provisions of the ADEA and Title VII. In a similar case, a concurrence by Eleventh Circuit Judge Barkett acutely noted:

> [I]n every statutory discrimination case, a decision based upon legitimate business necessity will never support a claim for liability. *Griggs* itself recognized and repeatedly emphasized that disparate impact is a basis for relief only if the practice in question is not founded on "business necessity," or lacks "a manifest relationship to the employment." [401 U.S. 424, 430-31 (1971)]. [The RFOA exception] of the ADEA adds nothing new.
>
> ... In light of the parallels between the substantive provisions of the ADEA and Title VII, and in light of the fact that Congress has amended the ADEA several times but has never explicitly excluded disparate impact claims, a reasonable interpretation of the [RFOA exception] is that it codifies the business necessity exception to disparate impact claims.

Adams, 255 F.3d at 1327-28 (Barkett, J., concurring).

I find Judge Barkett's reasoning fully persuasive. Under a theory of disparate impact, employers will still be able to have employment practices and policies that may burden over-age workers in a disproportionate way. These practices will be permissible, despite the disproportionate impact, provided the employer shows they are supported by a business necessity. Upon proving business necessity, the burden shifts to the employee to show that the practice in question was established not because of the legitimacy of the necessity, but merely as a pretext for invidious stereotyping. Therefore, I am not persuaded that adopting a disparate impact theory will lead to any inconsistencies with the RFOA exception.

That said, the cornerstone of the majority's holding relies on an analogous provision in the Equal Pay Act ("EPA"). Because the RFOA exception does not exist under Title VII, the majority looks instead to the EPA, which precludes disparate impact claims via its "any factor other than sex" language. The majority attempts to show that the similarities between the RFOA and EPA "any factor" exception should be construed by courts to demonstrate that the RFOA should similarly prohibit disparate impact. *See Washington v. Gunther,* 452 U.S. 161, 170 (1981) (juxtaposing the EPA's "any factor other than sex" language with Title VII's broadly inclusive prohibition against gender discrimination and stating that the language "confine[d] the application of the Act to wage differentials attributable to sex discrimination.").

The flaw in the majority's logic is that the terms "any" and "reasonable" are not synonymous. Under the ADEA, an employer with a disparate impact policy may be liable for age discrimination if factors relied on were not reasonable. Pursuant to the EPA, however, if an employment policy causes wage differences among men and women workers, the employer will not be liable unless the policy in question was based solely on gender. Thus, the ADEA and EPA exceptions cannot be read to have the same meaning unless the word "reasonable" is omitted from the RFOA exception. In this light, the premise of the majority opinion appears little more than ironic in that when it compares statutory language of the ADEA and Title VII to preclude disparate impact, the court advocates a dissimilar reading of almost identical statutes. Yet, when comparing the ADEA to the EPA, with the intent of precluding disparate impact, the majority applies a similar reading of exceptions which differ significantly. I disagree with the majority's analytical approach and its reading of *Gunther* as indicating that the ADEA cannot bar some "reasonable factors other than age" practices which have a disparate impact on workers over forty.

Additionally, the majority's contention that the ADEA and Title VII are not similar statutes, insofar as their application of the disparate impact theory, disregards the doctrine of *in pari materia*. It has long been held that judicial interpretations of one statute may be informed by interpretations of similar statutes. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("[When] Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). Under this well established statutory canon, "the interpretation of one statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships." *Nat. Fed'n of Fed. Employees v. Dep't. of Interior*, 526 U.S.

86 (1999) (defining the doctrine of *in pari materia*, citing several cases where the Court applied this doctrine to aid in its construction of a variety of statutes, and arguing that the doctrine was now "well established") *on remand*, 174 F.3d 393 (4th Cir.1999).

In the context of the ADEA and Title VII, adhering to this canon is particularly well suited because, as the majority concedes, the ADEA grew out of debates on Title VII. Furthermore, *in pari materia* has relevance because both aforementioned statutes apply to similar persons (here, the employees) and similar relationships (here, the employment context). Moreover, Congress carefully chose identical language for its statutes dealing with both discrimination against older workers and discrimination against those due to race or gender. Therefore, the majority should have applied the doctrine of *in pari materia* and interpreted the disparate impact theory as applicable to the ADEA.

II. THE ADEA LEGISLATIVE HISTORY

My second point of disagreement with the majority concerns its portrayal of the legislative history of the ADEA. The majority opinion subtly recognizes that the legislative history of the ADEA is not directly on point. Although the majority's opinion properly recognizes that the Supreme Court's 1971 endorsement of the disparate impact theory in *Griggs*, 401 U.S. at 430- 31, was later in time than Congress's enactment of the ADEA in 1967, the majority attempts to support its position by focusing on the underlying purposes of the legislation.

Although the language of Title VII and the ADEA are almost identical, the majority essentially dismisses *Griggs* as irrelevant to the calculus of age discrimination. The majority distinguishes *Griggs* from the ADEA on the grounds that *Griggs* interpreted Congress's intent underlying Title VII as sweeping in nature. The majority argues, "[i]n contrast to the refined purpose evidenced in the historical underpinnings to

the ADEA's enactment, the Supreme Court's opinion in *Griggs* discusses Title VII's broad remedial purpose." While it is undoubtably true that *Griggs* recognized disparate impact theory as an available tool in the employment discrimination toolbox to remedy past discrimination under Title VII, it does not necessarily follow, as the majority asserts, that the disparate impact tool is available only in a remedial context.

I disagree in two respects with the majority's holding that disparate impact theory should be limited to the context of Title VII. First, the textual similarity between Title VII and the ADEA evinces a congressional intent to provide similar protection against employment discrimination under the two statutes. Second, it is arguable whether historical discrimination should be a necessary precondition for recognizing a disparate impact theory. I acknowledge, as the majority does, that the ADEA and Title VII are distinct because the former lacks a history tied to past discrimination. In the absence of a clear statement to the contrary, however, I cannot assume that Congress intended to limit the remedial measures available under anti-discrimination statutes with almost identical language merely because the statutes arose out of distinct historical contexts. The Supreme Court in *Griggs*, for example, did not posit historical discrimination as the sole reason for disparate impact under Title VII; *Griggs* merely held that a showing of disparate impact was available to remedy this type of discrimination. *See* Jennifer J. Clemons and Richard A. Bales, *ADEA Disparate Impact in the Sixth Circuit*, 27 Ohio N.U. L. Rev. 1, 23 (2000). Moreover, the majority's emphasis on the historical posture of the ADEA and Title VII unduly minimizes the statutes shared aim of ridding from the workplace an environment of *concealed* discrimination. *Griggs*, 401 U.S. at 431 (stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"); *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (stating that the ADEA seeks to remedy "arbitrary" forms of age discrimination "based in large part on stereotypes

unsupported by objective facts, and often defended on grounds different from its actual causes"). Consistent with such an aim, a disparate impact theory may be a plaintiff's only tool in counteracting sophisticated discrimination. Therefore, due to the similarity of the ADEA and Title VII language, it is my view that the protection available under both statutes, including that from disparate impact, should also be similar.

The majority ignores the fact that *Griggs* does not stand alone as the only relevant decision applying disparate impact theory. Under Supreme Court precedent, the disparate impact theory has grown beyond its original purpose of alleviating racial discrimination claims. *See Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977) (applying disparate impact theory to Title VII sex discrimination claims). Furthermore, under the 1991 Civil Rights Act, 42 U.S.C. § 2000-e2(k)(1)(A)(I) (1994), disparate impact claims are readily available not only to plaintiffs alleging racial discrimination, but also to those claiming discrimination on the basis of gender, national origin, and religion.[7] In light of these developments, I cannot agree with the majority that the ADEA must be limited solely to disparate treatment claims.

I also do not agree with the majority's interpretation

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[7] Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, provides in pertinent part:

> Sec. 703. (k)(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;
>
> ....

42 U.S.C. § 2000e-2 (2003).

of the most prominent documentation of all ADEA legislative history, the Wirtz Report.[8] The majority uses the Report to bolster its argument that the ADEA was not premised on eradicating past discrimination. The flaw with the majority's use of this most critical evidence of congressional intent is its failure to acknowledge the argument, embodied within the Wirtz Report, that age discrimination was in fact "based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual cause." *See EEOC*, 460 U.S. at 231. The aforementioned conclusion seems to indicate that the ADEA's purpose may not have been limited to eradicating animus, as the majority suggests. Rather, and in contrast to the majority's view, the Wirtz Report indicates that Congress merely intended to utilize the ADEA to eliminate stereotypes that workers' productivity declines with age. That said, I acknowledge that the Wirtz Report is supportive evidence of Congress's intent concerning the ADEA and that the Report did in fact distinguish age discrimination as "rarely based on the sort of animus motivating some other forms of discrimination." My position merely suggests that because the Wirtz Report sheds the best light on Congress's intent in enacting the ADEA, a point the majority does not refute, this Report arguably provides more support for affirming, rather than denying, that the ADEA contains a disparate impact cause of action.

Furthermore, the legislative intent indicating that Congress meant to allow the disparate impact theory in ADEA actions may be discerned from a Congressional

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[8] The term "Wirtz Report" refers to a congressional report commissioned by the former Department of Labor Secretary W. Willard Wirtz which, pursuant to section 715 of Title VII, instructed the Secretary of Labor to conduct a study with recommendations for "legislation to prevent arbitrary discrimination in employment because of age." The origins of the ADEA's rationales and objectives can be traced to the resulting report entitled, *The Older American Worker: Age Discrimination in Employment* (1965). *See also EEOC*, 460 U.S. at 229-31 (tracing legislative history of the ADEA and central role of the Secretary of Labor Report).

amendment. In 1994, Congress amended the ADEA by adding the Older Workers Benefit Protection Act ("OWBPA"). 29 U.S.C. §§ 623, 626, 630(f) (1994). The statute requires an employer to provide the employee with information regarding the ages of workers offered severance pay and those who were not let go before the employee waives any potential discrimination claims. 29 U.S.C. § 626(f)(1)(E)-(G), (H)(ii) (1994). These statistics, comparing the ages of those terminated and those retained, would be of little relevance if the employee could not bring a disparate impact claim. Therefore, the addition of the OWBPA is additional evidence that the disparate impact theory should be available under the ADEA.

III. CONCLUSION

The majority today fails to heed the *Griggs* recognition that in a complex society, not all discrimination is apparent or overt. Often, such discrimination will be subtle and concealed. The practical consequence of the majority's decision is that it will allow an employer to exclude older workers from lower-level jobs simply on the basis of pretext, without an additional tool at the employee's disposal to counteract such sophisticated discriminatory acts. Contrary to the majority's stance, I agree with the Supreme Court's determination in *Hazen* that the disparate impact liability was designed to detect employment decisions that reflect "inaccurate and stigmatizing stereotypes." 507 U.S. at 610. Thus, I find no incompatibility with using disparate impact theory to prove liability under the ADEA.

Instead, I am concerned that by not allowing a disparate impact cause of action under the ADEA, the majority has essentially held such plaintiffs to the heightened evidentiary standard of *Washington v. Davis*, 426 U.S. 229 (1976), where sophisticated and concealed discrimination must be proved solely through intentional acts. The majority, however, fails to fully absorb the spirit of Justice Stevens's

concurrence in *Davis* that "the line between purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the court's opinion may assume." *Id.* at 254. Applied to our context, Justice Stevens's concurrence demonstrates that the majority's opinion, which distinguishes between intentional discrimination based on disparate treatment on the one hand and a disparate impact cause of action absent proof of intent on the other, may not be as clear as the majority seems to opine. Therefore, with regards to Part III of the majority opinion, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Civil Action No. 3:01-CV-367BN

AZEL P. SMITH, ET AL., PLAINTIFF

v.

CITY OF JACKSON, MISSISSIPPI, ET AL., DEFENDANT

Filed: Sept. 6, 2002

OPINION AND ORDER

This cause is before the Court on the Motion of Defendant for Summary Judgment. Having considered the Motion, Response, Rebuttal, attachments to each, and supporting and opposing authority, the Court finds that the Motion is well taken and should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs are police officers for the City of Jackson, Mississippi, ("the City") all of whom are 40 years of age or older. On October 1, 1998, the City adopted a pay plan granting raises to all city employees. The City revised that pay plan on March 1, 1999, as to employees of the Police and Fire Departments. The revised pay plan granted raises to all police officers and police dispatchers. However, those officers and dispatchers with five years or less tenure with the department received proportionately greater raises when

compared to their former pay than those with more than five years tenure. The plan accordingly created three categories for the purpose of the analysis of this case: 1) those officers and dispatchers with less than five years of tenure, most, if not all, of whom would have been under 40 years of age; 2) those 40 years of age or older, most, if not all, of whom would have had more than five years of tenure, and; 3) those under 40 years of age with more than five years of tenure. The issue presented by this case is whether such a plan based directly on tenure as opposed to age violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §. 6.21 et seq.

Plaintiffs make two claims of discrimination under the ADEA. The first claims intentional discrimination, or disparate treatment. The second claims unintentional discrimination, or disparate impact.

Defendant filed this motion for summary judgment on both claims. Regarding the claim of disparate treatment, Defendant argues (1) that Plaintiffs cannot make a prima facie case to shift the burden to Defendants, and (2) even if Plaintiffs could make a prima facie case, Defendant had a legitimate, non-discriminatory, market-driven rationale for the pay plan. Regarding the claim of disparate impact, Defendant argues (1) that such a claim is not cognizable under the ADEA, (2) even if such claim is cognizable, Plaintiffs cannot make out a prima facie case, and (3) even if Plaintiffs could make a prima facie case, Defendant had a legitimate, non-discriminatory, market-driven rationale for the pay plan.

Regarding their claim of disparate treatment, Plaintiffs argue that summary judgment is inappropriate for several reasons.[1] First, there has not been an opportunity for

[1] Plaintiffs have filed additional motions to support their opposition to summary judgment, including a Motion in Limine to Strike Portions of Defendants' Expert Witnesses' Reports and Testimony, and a Motion for Sanctions, a Default Judgment, Attorneys' Fees and Expenses, Expert Witness Fees and a Continuance, and a Motion to Strike Exhibits to Defendants' Motion for Summary Judgment.

adequate discovery. Second, Defendant has failed to meets its burden of establishing that there are no genuine issues of material fact. Third, summary judgment is inappropriate where a rational fact finder could conclude that the employer's action was discriminatory. Fourth, Plaintiffs argue that the Defendant had knowledge that the pay plan considered length of tenure. Plaintiffs argue that such knowledge creates a jury question regarding Defendant's intent. Fifth, Plaintiffs argue that Defendant used terms indicated age-based bias, and that such use defeats summary judgment.

Regarding their claims of disparate impact, Plaintiffs argue that summary judgment is also inappropriate. First, statistical evidence indicating a disparate impact on Plaintiffs creates a jury question. Second, Fifth Circuit precedent recognizes claims for disparate impact under the ADEA.

The material facts are not in dispute.[2] Both sides agree that the City implemented a pay plan that increased police salaries. Both sides agree that all police officers received some level of pay increase. Both sides agree that some younger officers received higher raises than some older officers, when viewed as a percentage of previous salary.

II. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

[2] Plaintiffs argue that the date of implementation of the pay plan is in dispute. Testimony varies as to whether the plan was implemented in October of 1998 and amended in March of 1999, or whether it was first implemented in March of 1999. The Court finds this distinction to be immaterial to determining whether Plaintiffs' claims may go forward.

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(C). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 549 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. *Id.* As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non-moving party's claim. *Id.* at 323-24. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. It is improper for the district court to "resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is also improper where the court merely believes it unlikely that the non-moving party will prevail at trial. *National Screen*

Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

III. ANALYSIS

A. Disparate Treatment

In order to make a prima facie case of discrimination under the ADEA, Plaintiffs must demonstrate that they are members of the protected class, that they suffered an adverse employment decision, and that the adverse decision was motivated by unlawful age discrimination. *Ross v. University of Texas at San Antonio*, 139 F.3d 521, 525 (5th Cir. 1998). Here, the Plaintiffs are all members of the protected class. For the purpose of deciding this Motion for Summary Judgment, the Court assumes arguendo that Plaintiffs' evidence is sufficient to demonstrate that Plaintiffs suffered an adverse employment decision.

Even so, Plaintiffs fail to demonstrate that the City was motivated by unlawful age discrimination. Plaintiffs proffer two pieces of evidence in favor of a finding of age discrimination. First, Plaintiffs point to comments made by Dr. George Terry, who was the Personnel Director for the City of Jackson at the time. Dr. Terry's comments came at an employee grievance hearing held on May 20, 1999. Several of the Plaintiffs were allegedly present at the hearing. According to Plaintiffs, the following exchange took place between Dr. Terry and an unidentified police officer:

> OFFICER??: Let me ask you a question, the pay plan shows that you didn't even consider longevity on the department [inaudible] What does longevity mean for the department [inaudible]
>
> TERRY: I think the only response that I can make to that is that the pay plan considered tenure only

> once. Five years or less and more than five years. There was no other consideration for, for, for tenure.

Plaintiffs' Response in Opposition to the Defendants' Motion for Summary Judgment, Exhibit B.

Dr. Terry's comments merely demonstrate that the City knowingly considered length of service as a factor in its pay plan-Consideration of length of service is not the same as consideration of age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993). Rather, "an employee's age is analytically distinct from his years of service.... [Therefore] an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Hazen Paper*, 507 U.S. at 611. *See also Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981) ("seniority and age discrimination are unrelated. The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status.... We state without equivocation that the seniority a given plaintiff has accumulated entitles him to no better or worse treatment in an age discrimination suit"). Thus, Dr. Terry's comments are not enough for Plaintiffs to demonstrate an unlawful motive on the part of the City.

The second piece of evidence on which Plaintiffs rely is the Supplemental Combined Responses of All Plaintiffs to Defendants' First Combined Interrogatories and Request for Production of Documents. Defendants' Motion for Summary Judgment, Exhibit 9. Therein, several Plaintiffs provide a response to an Interrogatory from Defendant asking for the nature and details of each alleged act of intentional discrimination against them. Several plaintiffs claim to have been subjected to comments relating to their age, but fail to attribute such comments to Defendant. The only individuals to whom comments are attributable are Dr.

Terry, Officer Deric Hearn, and Deputy Chief Cleon Butler. Because neither Officer Hearn, Deputy Chief Butler, nor any other police officer played any role as a decision-maker with regard to the implementation of the pay plan, any comments made by them are irrelevant to this matter. *See Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 304 n.5 (5th Cir. 2000).

Additionally, "[i]n order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee." *Wyvill*, 212 F.3d.at 304. None of the comments attributable to any individual here satisfies this test. Thus, the Plaintiffs' Combined Responses do not demonstrate an unlawful motive on the part of the City.

Even if Plaintiffs could produce enough evidence of unlawful motive by the City, that would only serve to shift the burden to the City to demonstrate a "legitimate non-discriminatory reason for the employment decision." *Ross*, 139 F.3d at 125. Here, the City has demonstrated such a reason: to bring starting salaries for police officers up to the regional average, to develop a more generous pay scale within the confines of the city budget, and to consider tenure as one factor in the pay scale. Once such a non-discriminatory reason is demonstrated, the burden shifts back to Plaintiffs. *Ross*, 139 F.3d at 525.

Thus, the "plaintiff is left with the ultimate burden of presenting evidence from which a reasonable trier of fact could infer age discrimination. *Ross*, 139 F.3d at 525. To do so, Plaintiff must present evidence that " (1) rebuts the employer's non-discriminatory reason, and (2) creates an inference that age was a determinative factor in the challenged employment decision." *Id.* Here, Plaintiffs have presented no such evidence. Thus, Plaintiffs cannot maintain their burden.

Because the Court finds that Plaintiffs cannot meet their burden of proof for claims of disparate treatment under the ADEA, the other motions of Plaintiff in opposition to the Motion of Defendant for Summary Judgment related to claims for disparate treatment are moot. Accordingly, the Motion for Summary Judgment of Defendant is granted with respect to Plaintiffs' claims of disparate treatment under the ADEA.

B. Disparate Impact

Plaintiffs claim that even in the absence of evidence of intent, their claims for disparate impact should survive summary judgment. To the extent that claims of discrimination by disparate impact exist, no discriminatory motive need by proved. *Hazen Paper*, 507 U.S. at 609. Instead, it is sufficient to demonstrate that facially neutral employment practices impact a protected group more harshly than other groups. *Id.*

The United States Supreme Court has "never decided whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper*, 507 U.S. at 610. The Circuit Courts that have considered the issue are split. To this point, four circuits have expressly held that the ADEA does not allow for claims of disparate impact.[3] Two circuits have withheld so holding, but have stated strong doubts as to whether the ADEA allows for claims of disparate impact.[4] Three circuits

[3] *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.1999), cert. denied, 528 U.S. 811 (1999); *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), cert. denied, 515 U.S. 1142 (1995); *Ellis v. United Airlines*, 73 F.3d 999 (10th Cir. 1996), cert. denied 517 U.S. 1245 (1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), cert. granted 122 S. Ct. 643, 151 L.Ed.2d 561 (2001), cert. dismissed as improvidently granted 122 S.Ct. 1290, 152 L.Ed.2d 345 (2002).

[4] *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995), cert. denied 516 U.S. 916 (1995); *Lvon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135 (6th Cir. 1995).

have held that the ADEA does allow for claims of disparate impact.[5] The Fifth Circuit Court of Appeals has not addressed the issue.[6]

This Court agrees that the ADEA does not allow for claims of disparate impact. The text of the ADEA provides that "an employer may 'take any action otherwise prohibited...where the differentiation is based on reasonable factors other than age.'" *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325 (11th Cir. 2001) (quoting 29 U.S.C. § 623 (1)(1)). Several courts have noted that this language seems to eliminate the possibility of a disparate impact claim. *See, e.g., Adams*, 255 F.3d at 1325; *Mullin*, 164 F.3d at 702. Additionally, although the Supreme Court did not answer the question in *Hazen Paper*, language therein strongly suggests that no disparate impact claim should lie in cases such as this one. As the Eleventh Circuit states:

> First, the Court noted that "[d] isparate treatment... captures the essence of what Congress sought to prohibit in the ADEA." *Hazen*, 507 U.S. at 610, 113 S.Ct. at 1706. In addition, the Court reiterated that, in making employment decisions, the use of factors correlated with age, such as pension status, did not rely on "inaccurate and stigmatizing stereotypes" and was acceptable. *Id.* at 611, 113 S. Ct. at

[5] *Criley v. Delta Airlines*, 119 F.3d 102 (2d Cir. 1997), cert. denied 522 U.S. 1028 (1997); *Lewis v. Aerospace Cmt. Credit Union*, 114 F.3d 745 (8th Cir. 1997), cert. denied 523 U.S. 1062 (1998); *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), cert. denied 532 U.S. 914 (2001).

[6] Plaintiffs cite several cases within the Fifth Circuit for the proposition that "the district courts have uniformly applied the disparate impact analysis to age discrimination cases." Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 10. The Court points out that the district court cases cited are not controlling. However, the Court also finds that none of the cited cases is directly on point.

> 1706-07. That position is inconsistent with the viability of a disparate impact theory of liability, which requires no demonstration of intent, but relies instead on the very correlation between the factor used and the age of those employees harmed by the employment decision to prove liability.

Adams, 255 F.3d at 1326 (quoting *Hazen Paper*, 507 U.S. 604 (1993)).

Because the Court finds that the ADEA does not allow for claims of disparate impact, the other motions of Plaintiff in opposition to the Motion of Defendant for Summary Judgment related to claims for disparate impact are moot. Accordingly, the Motion for Summary Judgment of Defendant is granted with respect to Plaintiffs' claims of disparate impact under the ADEA.

IV. CONCLUSION

IT IS THEREFORE ORDERED that the Motion of Defendant for Summary Judgment is hereby granted in its entirety. A separate Final Judgment will be entered this day.

IT IS FURTHER ORDERED that the following Motions of Plaintiff are moot and, accordingly, are denied: (1) Motion in Limine to Strike Portions of Defendants' Expert Witnesses' Reports and Testimony, (2) Motion for Sanctions, a Default Judgment, Attorneys' Fees *and* Expenses, Expert Witness Fees and a Continuance, and (3) Motion to Strike Exhibits to Defendants' Motion for Summary Judgment.

SO ORDERED this the 6th day of September, 2002.

/s/ William Barbour
WILLIAM BARBOUR
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Civil Action No. 3:01-CV-367BN

AZEL P. SMITH, ET AL., PLAINTIFF

v.

CITY OF JACKSON, MISSISSIPPI, ET AL., DEFENDANT

Filed: Sept. 6, 2002

FINAL JUDGMENT

In accordance with the Opinion and Order entered this day granting the Motion of Defendant for Summary Judgment, this cause is hereby dismissed with prejudice.

SO ORDERED this the 6th day of September, 2002.

/s/ William Barbour
WILLIAM BARBOUR
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAR 2 - 2004
OFFICE OF THE CLERK

No. 03-1160

IN THE

Supreme Court of the United States

AZEL P. SMITH, *et al.*,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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Counsel for Respondents

ARGUMENT

The petition for a writ of *certiorari* essentially seeks review of the question whether so-called "disparate impact" claims are cognizable under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634. Although the decision below correctly resolves that question, if the Court is inclined to review the issue, respondents do not oppose the Court's granting of this petition in order so that it may do so.

As the petition suggests (Pet. 5-11), the question presented is one that satisfies the Court's published criteria for granting *certiorari*. *See* U.S. Supreme Court Rule 10(a). The courts of appeals are indeed deeply divided about whether disparate impact claims are cognizable under the ADEA, with decisions of the First, Fifth, Seventh, Tenth, and Eleventh Circuits conflicting with decisions of the Second, Eighth, and Ninth Circuits. *See* Pet. 6-8; Pet. App. 6a-7a. Furthermore, the question is one of national significance: Thousands of public and private employers engage, without discriminatory motive, in employment practices that disproportionately affect employees of different ages. *See* Richard A. Posner, *Aging and Old Age* 51-58, 72-78, 115-17, 358-60 (1995). Indeed, the question presented here is the same as the question upon which the Court initially granted *certiorari* in *Adams v. Florida Power Corp.*, 534 U.S. 1054 (2001), *cert. dismissed*, 535 U.S. 228 (2002).

The petition for a writ of *certiorari* also correctly notes (Pet. 6-11) that the decision below squarely presents the question upon which the courts of appeals have divided. To be sure, the complaint in this case raises a discriminatory *compensation* claim; and, although the petition does not acknowledge it (Pet. 11-13), even under Title VII of the Civil Rights Act of 1964, this Court has held that the disparate impact doctrine is not applicable to such claims. *See County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981); *Los Angeles v. Manhart*, 435 U.S. 702, 710-11 n.20 (1978); *cf.*

Nashville Gas Co. v. Satty, 434 U.S. 136, 144-45 (1977) (declining to decide whether disparate impact doctrine applies to cases arising under subsection 703(a)(1), the provision applicable to discriminatory compensation claims). In addition, petitioners' challenge to respondents' pay plan focuses on salary *increases* rather than on the salaries themselves; and, although the petition does not recognize it (Pet. 11-13), this Court and other courts have held that, even where the disparate impact doctrine may be applicable, such claims cannot properly isolate and challenge a single component of a pay plan, benefit plan, or other integrated employment system that treats the protected class of employees more favorably overall. *See, e.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 138-39 (1976); *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1163-64 (7th Cir. 1992); *EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 744 (E.D. Pa. 1985). But the court below did not rest its decision in this case on these narrower, more limited, grounds. Rather, the court below held, more broadly, that the disparate impact doctrine is not available under the ADEA for any kind of claim. *See* Pet. App. 2a, 7a-8a, 10a, 17a-18a, 21a-22a. As the petition argues, that is the precise rule of decision upon which the courts of appeals are so deeply divided.

Contrary to the assertions in the petition, however, the court below quite correctly held that disparate impact claims are not cognizable under the ADEA. The ADEA's prohibitory provisions, which apply to discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1) & (a)(2), are "read most naturally as outlawing only conduct motivated by age." Pet. App. 9a; *see also* Brief for Respondents in *Adams v. Florida Power Corp.*, No. 01-584 ("*Florida Power* Br.") at 7-9. This more natural construction of the statutory language is indeed compelled by other provisions of the ADEA that are not found in Title VII, including the provision in subsection 623(f)(1) which states in pertinent part that "[i]t shall not be unlawful . . . to take any action otherwise prohibited" by

subsection 623(a) "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1); *see* Pet. App. 11a-18a; *Florida Power* Br. at 10-14. The ADEA's legislative history and purposes confirm this view. *See* Pet. App. 18a-22a; *see also Florida Power* Br. at 16-19, 28-33.

Nonetheless, if the Court is inclined to consider this question and resolve the widespread conflict among the federal courts of appeals about it, respondents do not oppose the granting of this petition. Because the Fifth Circuit vacated the summary judgment dismissal of petitioners' disparate treatment claim as premature (Pet. App. 27a), this case is going back to the district court for further proceedings in all events. All parties to the litigation, including respondents, are better served by obtaining final clarification from this Court about whether disparate impact claims are cognizable under the ADEA prior to the conduct of any additional discovery or litigation in this case. Indeed, no party to the litigation would be well-served were this issue decided by this Court, in this case or in any other case, after the conduct of further proceedings below. Accordingly, if the Court is inclined to resolve the circuit split on the availability of disparate impact claims under the ADEA, respondents do not oppose the Court taking up the issue in this case at this time.

CONCLUSION

For these reasons, respondents do not oppose the granting of *certiorari* on the question whether disparate impact claims are cognizable under the ADEA.

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Dated: March 2004

(3)

Supreme Court, U.S.
FILED
MAR 10 2004
OFFICE OF THE CLERK

No. 03-1160

IN THE

Supreme Court of the United States

Azel P. Smith *et al.*,

Petitioners,

v.

City of Jackson, Mississippi, and
Police Department of the City of Jackson, Mississippi.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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March 9, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

REPLY BRIEF FOR THE PETITIONERS

Respondents acknowledge that the petition for certiorari satisfies all of the criteria for plenary review in this Court. Respondents suggest in passing, however, that the complaint may not state a disparate impact claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621 *et seq.* We write briefly to answer that suggestion.

1. The petition established that the complaint in this case presents a prototypical disparate impact claim. Pet. 11-13. Plaintiffs make out a prima facie disparate impact claim by "identifying the specific employment practice that is challenged" and providing "statistical evidence * * * sufficient to show that the practice in question has caused" the discriminatory effect. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Petitioners have met this burden by alleging that the respondents' Pay Plan, a written policy enacting a one-time recalibration of the salary scale, "resulted in pay increases to officers under forty years of age that were four standard deviations higher than the raises received by officers over forty." Pet. App. 5a.

2. Respondents dispute none of the foregoing. Nor do they contend that the complaint presents anything less than an ideal vehicle in which to decide the question presented. Although the significance of respondents' point is unclear, they do assert that this Court "has held that the disparate impact doctrine is not applicable" to discriminatory compensation claims under Title VII. BIO 1. Not so. In fact, this Court suggested the opposite. See, *e.g.*, *Los Angeles* v. *Manhart*, 435 U.S. 702, 710 n.20 (1978) ("assuming [that] disparate-impact analysis applies to fringe benefits" under Title VII); see also *Wambheim* v. *J.C. Penney Co., Inc.*, 705 F.2d 1492, 1494 (CA9 1983) (holding, based on this Court's opinion in *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982), that "disparate impact analysis is appropriate" to challenge discrimination in "compensation, terms, conditions, or privileges of employment").

Congress's 1991 amendments to Title VII in turn confirmed what this Court's precedents had already suggested – that disparate impact claims are available under Title VII when an employer "discriminate[s] against any individual with respect to his compensation." 42 USC 2000e-2(a)(1); *id.* § 2000e-2(k)(1)(A)(i). See, *e.g.*, *Hemmings* v. *Tidyman's, Inc.*, 285 F.3d 1174, 1190 (CA9 2001) (sustaining a verdict in favor of female plaintiffs in a Title VII disparate impact challenge to the defendant's use of a subjective process for awarding salary and benefits); *Anderson* v. *Zubieta*, 180 F.3d 329, 339-40 (CADC 1999) (reversing the district court's grant of summary judgment and remanding plaintiffs' race- and national-origin-based disparate impact claim against defendants' pay policies for trial).

The cases cited by respondents involve the distinct context of sex discrimination, and their narrow holdings cannot be read to create a broad prohibition against all disparate impact claims attacking discriminatory compensation schemes. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), in holding that a plaintiff's disparate impact claim against a policy that denied sick pay to pregnant employees was precluded by this Court's opinion in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), explicitly refused to decide whether disparate impact theory applies to all Title VII compensation claims. *Nashville Gas*, 434 U.S. at 144.[1]

Respondents' citations to *County of Washington* v. *Gunther*, 452 U.S. 161, 170-71 (1981), and *Manhart*, 435 U.S. at 710 n.20, simply beg the question presented by this case. They turn on a specific provision of the *Equal Pay Act* that applies only to *sex-based* discriminatory compensation

[1] Moreover, these portions of the holdings of *Gilbert* and *Nashville Gas* were superseded by the 1978 amendments to Title VII, which brought pregnancy within the ambit of the statute. *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 676 (1983); *Grant* v. *General Motors Corp.*, 908 F.2d 1303, 1307 (CA6 1990).

claims. As the dissent below explained, Pet. App. 32a, the circuits which agree that disparate impact claims are available under the ADEA hold that precedents under the Equal Pay Act, which provides an affirmative defense for wage differentials based upon "*any* other factor other than sex," 29 U.S.C. 206(d) (emphasis added), are inapposite to the ADEA, which contains an affirmative defense only for "*reasonable* factors other than age," *id.* 623(f) (emphasis added).

2. Respondents also contend that suits challenging an isolated component of a pay scheme do not state a disparate impact claim. BIO 2. Even if true, that is irrelevant, for it does not describe this case. Petitioners challenge the entire Pay Plan, the purpose and effect of which was to recalibrate respondents' pay scale. Petitioners make out a strong prima facie disparate impact claim by offering statistical evidence of the Plan's discriminatory effect upon employees age forty and older. Pet. 11-13.

This case is therefore distinguishable from the decisions cited by respondents, in which the plaintiffs challenged only a narrow component of a complex compensation scheme and failed to offer sufficient evidence to make out a prima facie disparate impact claim. In *Finnegan* v. *Trans World Airlines*, 967 F.2d 1161, 1163-64 (CA7 1992), the plaintiffs failed to make out a prima facie disparate impact claim because they challenged only the reduction of a single benefit (vacation time) in the context of a major cost-cutting plan designed to avoid bankruptcy. And in *EEOC* v. *Governor Mifflin School District*, 623 F. Supp. 734, 743 (E.D. Pa. 1985), the plaintiffs failed to make out a prima facie disparate impact claim because they challenged only the mechanism by which *annual* raises at the top of the teacher pay scale were calculated.

But in any event, this Court's precedents do not preclude a disparate impact claim directed at one portion of a larger compensation scheme. Respondents' citation to *Gilbert* is inapt. *Gilbert* dismissed a disparate impact claim by female

employees on the ground that a disability insurance plan that excluded disabilities arising from pregnancy had no gender-based disparate impact. *Gilbert*, 429 U.S. at 137-40. It stands for no broader proposition. Even *Governor Mifflin*, cited approvingly by the respondents, conceded that *Gilbert* did not offer very strong support for the defendant's claims that "it is improper to focus on just one aspect of the compensation system." *Governor Mifflin*, 623 F. Supp. at 734.

In all events, the petition does not call on *this Court* to decide whether petitioners have a winning claim of disparate impact discrimination. That question will be left to the lower courts after remand. The only relevant point is that the complaint certainly states a viable claim of disparate impact discrimination, such that this case presents an appropriate vehicle in which to decide the question presented.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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March 9, 2004[2]

---

[2] Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Michael P. Abate, William B. Adams, and Jennifer J. Thomas. Clinic members David M. Cooper, Eric J. Feigin, Daniel S. Goldman, and Nicola J. Mrazek also participated.

(9)

No. 03-1160

Supreme Court, U.S.
FILED
JUN 14 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

Azel P. Smith, *et al.*,
Petitioners,

v.

City of Jackson, Mississippi, and
Police Department of the City of Jackson, Mississippi,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 11, 2004
PETITION FOR CERTIORARI GRANTED MARCH 29, 2004

TABLE OF CONTENTS

Court of Appeals Docket Entries.....1

District Court Docket Entries.....2

Complaint.....3

Answer.....10

Performance Pay Plan.....15

Pay Plan Revision.....26

Report of Secretary Wirtz.....32

U.S. Court of Appeals
for the Fifth Circuit

CIVIL DOCKET FOR 02-60850
Smith, et al v. City of Jackson MS, et al

AZEL P SMITH; JACQUELINE BUTLER; RUTHIE PORTER; GLORIA BURNS; WILLIE ALLEN; ET AL
Plaintiffs – Appellants
v.
CITY OF JACKSON, MISSISSIPPI; POLICE DEPARTMENT OF THE CITY OF JACKSON, MISSISSIPPI
Defendants – Appellees

10/14/02	Civil rights case docketed. NOA filed by Appellant Azel P Smith, Appellant Jacqueline Butler, Appellant Ruthie Porter, Appellant Gloria Burns, Appellant Willie Allen, Appellant Et Al. [02-60850] (trm)
11/13/03	Opinion filed. Issd in T form? Y Mandate pull date is 12/4/03. [02-60850] (kgc)
3/29/04	Supreme Court order received granting petition certiorari [4754429-1] by Appellant Azel P Smith, Jacqueline Butler, Ruthie Porter, Gloria Burns, Willie Allen, Et AL on 03/29/04. [02-60850] (dse)

U.S. District Court
for the Southern District of Mississippi

CASE #: 01-CV-367
Smith, et al v. City of Jackson, et al

5/14/01		COMPLAINT Filing Fee $150.00 Receipt #3996; jury demand; Notice of Assignment mailed. (ihc) [Entry date 05/15/01]
6/19/01		ANSWER to Complaint by defendant City of Jackson, defendant Jackson Police Dept. (Attorney J. Anthony Williams), (cwl) [Entry date 06/19/01]
9/6/02	78	JUDGMENT for defendant City of Jackson, defendant Jackson Police Dept. against all plaintiffs and this cause is dismissed with prejudice. (signed by Judge William H. Barbour Jr.); copies mailed. ob 2002 page 2944 (jlh) [Entry date 09/10/02]
3/15/04	86	ORDER; that in an opinion and order rendered by the undersigned on 9/6/02, defendants' motion for summary judgment was granted; on the same day a final judgment was issued dismissing case with prejudice, plaintiffs appealed to the U.S. Court of appeal; that in a Report of 1/13/04, plaintiffs informed the Court that all parties agreed to a stay; that this cause Stayed pending a decision by the U.S. Supreme Court on plaintiffs' Petition or Writ of Certiorari (signed by Judge William H. Barbour Jr.); copies mailed and certified copy to USCA. (sec) [Entry date 03-16-04] [Edit date 04/15/04]

COMPLAINT
INTRODUCTION

This action seeks all legal remedies for age discriminatory pay disparities, including front pay, back pay, compensatory damages and injunctive relief for the unlawful actions of the Defendants the City of Jackson and the City of Jackson Police Department in implementing across the board salary policies impacting against Plaintiffs solely because of their age, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621 *et seq*.

JURISDICTION

1.

Jurisdiction is conferred by the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621, *et. seq*., and 29 U.S.C. Section 216.

PARTIES

2.

Plaintiffs Azel P. Smith, Jacqueline Butler, Ruthie Porter, Gloria Burns, Willie Allen, Joe L. Austin, Jerry Brister, Harvey L. Davis, William H. Gladney, Sr., Tommie L. Grant, Ned Garner, William R. Gardner, Samuel Haymer, James J. Howard, Warren E. Hull, Thomas Hunter, Arlander LuAllen, Jr., Willie Mack, Eugene McDonald, Carey N. Parkinson, Cleotha Ratliff, John M. Russell, David L. Shaw, Wayne Simpson, Jr., Richard J. Smith, Kenneth W. Stemmons, James B. Strawbridge, Alphonso Taylor, Miller Weston, and Shirley Williams are adult resident citizens of Hinds County, Mississippi.

3.

At all times material hereto, Plaintiffs have been at least forty (40) years of age, and are therefore within the protected class of persons under the ADEA.

4.

At all times material herein, Plaintiffs have been or were employees of the Defendants within the meaning of the Age Discrimination in Employment Act, 29 U.S.C. 630(F), who were and are qualified for his or her positions.

5.

The Defendants, City of Jackson, Mississippi and its Police Department are employers within the meaning of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(b).

FACTS

6.

The Plaintiffs are long term, successful members of the City of Jackson, Mississippi Police Department and/or employees of the City of Jackson, Mississippi, serving as investigators, dispatchers, traffic patrolmen, administrative investigators, or patrol personnel.

7.

Plaintiffs have over the years of their employment, received promotions, raises, and step pay increases, commendations and awards for merit.

8.

In or about March 1999, the Defendants approved and began implementing a revised pay scale for its employees, including the Plaintiff dispatchers and police officers, which plan was reputed to seek to achieve salary increases to, *inter alia*, "attract and retain qualified people," "maintain competitiveness with other public sector agencies," and "provide incentive for performance".

9.

The actual effect of the said pay plan was to increase the pay for younger workers at the expense of the officers and employees who were over 40 years of age.

10.

This discriminatory policy of the defendants in the City of Jackson were set forth in the Revised Performance Pay Plan made a part of the Policy and Procedure maintained by the Department of Personnel Management of the City of Jackson, Mississippi.

11.

Plaintiffs Azel Smith and Jacqueline Butler, individually and on behalf of a class of similarly situated employees within the protected age group (forty and over), and each of the Plaintiffs herein, individually, filed charges of discrimination with the Equal Employment Opportunity Commission.

12.

As a result, on or about March 31, 2000, the Equal Employment Opportunity Commission by and through a Determination issued by Benjamin Bradley, Area Director, made findings against the City of Jackson and its Police Department and invited the City to participate in conciliation efforts. True and correct copies of said Determinations for the employees, police officers, and dispatchers are annexed hereto as Exhibit "A" and "B" respectively.

13.

The United States Equal Employment Opportunity Commission found that the City of Jackson, Mississippi and the City of Jackson, Mississippi Police Department were employers within the meaning of the Age Discrimination in Employment Act.

14.

The Equal Employment Opportunity Commission found that the defendants had instituted a city-wide pay plan which adversely impacted the Plaintiffs in that the pay plan did not initially consider seniority or performance, as had been used previously when wage increases were granted.

15.

The Equal Employment Opportunity Commission found that the new pay plan initially offers more substantial wage increases to non-protected age group members regardless of seniority or performance level, and that this type of action is in direct violation of the Age Discrimination In Employment Act, in that employees in the protected age group are adversely affected because of age by an employment action with respect to disparate wage increases.

16.

The Equal Employment Opportunity Commission conciliation efforts proved futile.

17.

On or about February 16, 2001, the Equal Employment Opportunity Commission found cause for the Plaintiffs herein in the Age Discrimination in Employment Act charge filed by Plaintiffs. A true and correct specimen copy of said Right to Sue letter as issued to each individual Plaintiff by the Equal Employment Opportunity Commission is annexed hereto and incorporated herein as Exhibit "C."

18.

Plaintiffs have therefore fully complied with the exhaustion provisions of the Age Discrimination in Employment Act at 29 U.S.C. Section 626(d).

19.

Defendants, by their actions, have willfully, intentionally, purposely, maliciously, and with reckless indifference to Plaintiffs' federally protected right to be free from discrimination due to age, discriminated against Plaintiffs, with respect to their compensation, terms, conditions and privileges of employment, because of their age, in violation of the Age Discrimination in Employment Act, justifying an award of twice Plaintiffs' back pay (including all fringe benefits).

20.

As a result of the aforesaid described actions of the Defendant, the Plaintiffs have sustained and will continue to sustain in the future, irreparable harm for which there is no adequate remedy at law, and substantial monetary damages. Said monetary damages include damages for back pay (including all fringe benefits), front pay (including all fringe benefits) and injunctive relief ordering Plaintiffs be given pay raises commensurate with their seniority, experience and performance.

CAUSE OF ACTION

21.

The acts of the Defendant in discriminating against Plaintiffs because of their age constitutes a willing, knowing and intentional violation of Plaintiffs' rights prohibited by the Age Discrimination in Employment Act. 29 U.S.C. Section 621, *et. seq.*

RELIEF

22.

WHEREFORE, Plaintiff prays that this Court will take jurisdiction of the parties and the subject matter and grant the following relief:

(a) A declaratory judgment that Plaintiffs were discriminated against in violation of their rights under the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 630(f);

(b) A temporary restraining order and preliminary and permanent injunction mandatorily enjoining Defendants to recalculate and insure payment to Plaintiffs of the differential of all back pay commensurate with each Plaintiff's seniority, experience and performance, including fringe benefits such as, *inter alia*, health insurance and retirement contributions, and enjoining the Defendants to implement such pay raises prospectively;

(c) A judgment from and of Defendants in the amount of Plaintiffs' back pay (including all fringe benefits) and front pay (including fringe benefits).

(d) Pursuant to the willful violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621, *et seq.*, and 29 U.S.C. Section 216, a judgment from and of Defendants for liquidated damages in the amount of twice the Plaintiffs' back pay (including all fringe benefits) and front pay (including all fringe benefits);

(e) Pre-judgment and post judgment interest on judgments obtained, costs of this cause and a reasonable attorney's fee; and

(f) Any other such relief provided by a Court of equity to which Plaintiff may be entitled under the Age Discrimination in Employment Act of 1967.

Respectfully submitted,

_____

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ANSWER AND AFFIRMATIVE DEFENSES

Comes now, the Defendants City of Jackson Mississippi and the City of Jackson Police Department, by and through counsel, and files this their Answer and Affirmative Defenses to the Complaint filed herein and would show unto the Court the following, to wit:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Complaint is barred by the applicable statute of limitations.

THIRD DEFENSE

The Defendant incorporates and alleges each and every defense available pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

FOURTH DEFENSE

The process issued is insufficient.

FIFTH DEFENSE

The service of process is insufficient.

SIXTH DEFENSE

The court lacks jurisdiction over the subject matter.

SEVENTH DEFENSE

The court lacks jurisdiction over the person of the Defendants.

EIGHTH DEFENSE

At all times and as to all matters material to the Complaint, the Defendants acted reasonably and in accordance with law and did not breach any duty owed to the Plaintiff.

NINTH DEFENSE

The Defendants and its employees, agents, and servants, at all times relevant hereto, used the degree of

care required of them under law and are not liable in damages to the Plaintiff.

TENTH DEFENSE

Any injury, damage, or deprivation alleged or suffered by the Plaintiffs was the result of the Plaintiffs' failure to act reasonably to avoid or mitigate such injury, damage or deprivation.

ELEVENTH DEFENSE

If any injury, damage, or deprivation was suffered by the Plaintiffs, then the Plaintiffs contributed to such injury, damage, or deprivation and failed to act reasonably to avoid or mitigate said injury, damage, or deprivation because the Plaintiffs would have had the last clear chance to avoid the accident as alleged herein.

TWELFTH DEFENSE

The actions or inactions on the part of the Plaintiffs or of third parties was the sole, proximate and only cause of the incident complained of and the alleged damages sustained by the Plaintiffs, if any. That in the alternative, the actions or inactions on the part of the plaintiffs or third parties amounted to an intervening cause and as such, constitute the sole, proximate and only cause of the incident complained of and the damages sustained by the Plaintiffs, if any.

THIRTEENTH DEFENSE

If the actions or inactions on the part of the Plaintiffs or third parties was not the sole, proximate and only cause of the incident complained of and the alleged damages sustained by the Plaintiffs, then actions or inactions on the part of the Plaintiffs or third parties caused and contributed to the incident complained of and the alleged damages sustained by the Plaintiffs. Thereby, any damages which the Plaintiffs would otherwise be entitled must be reduced in degree and to the proportion that the actions or inactions of the Plaintiffs or third parties caused or contributed to the incident.

FOURTEENTH DEFENSE

The Defendant asserts any and all defenses available to it under Miss. Code Ann. § 85-5-7.

FIFTEENTH DEFENSE

Plaintiff is not entitled to any injunctive relief because he has an adequate remedy at law.

SIXTEENTH DEFENSE

The actions and conduct complained of do not violate any constitutional, federal or statutory right of which these Defendants should have reasonably been aware.

SEVENTEENTH DEFENSE

The Plaintiffs' claims are barred because he failed to exhaust his administrative remedies available under Title VII and 180 days have now passed since the alleged act of discrimination upon which his claim is based occurred.

EIGHTEENTH DEFENSE

The Plaintiffs are not entitled to recover any compensatory damages because his Complaint fails to allege disparate treatment.

NINETEENTH DEFENSE

The Plaintiffs are not entitled to recover any compensatory damages because they failed to file individual charges of discrimination which deprived the City of its opportunity to conciliate the claim before the Equal Employment Opportunity Commission.

TWENTIETH DEFENSE

Without waiving any of the above defenses, the responding Defendant would answer the allegations contained in the Complaint, paragraph by paragraph, as follows:

1.

The allegations of the Paragraph titled "Introduction" are denied.

2.

The allegations of Paragraph One are denied.

3.

The allegations of Paragraph Two are denied.

4.

The allegations of Paragraph Three are denied.

5.

The allegations of Paragraph Four are denied.

6.

The allegations of Paragraph Five are denied.

7.

The allegations of Paragraph Six are denied.

8.

The allegations of Paragraph Seven are denied.

9.

The allegations of Paragraph Eight are denied.

10.

The allegations of Paragraph Nine are denied.

11.

The allegations of Paragraph Ten are denied.

12.

The allegations of Paragraph Eleven are denied.

13.

The allegations of Paragraph Twelve are denied.

14.

The allegations of Paragraph Thirteen are denied.

15.

The allegations of Paragraph Fourteen are denied.

16.

The allegations of Paragraph Fifteen are denied.

17.

The allegations of Paragraph Sixteen are denied.

18.

The allegations of Paragraph Seventeen are denied.

19.

The allegations of Paragraph Eighteen are denied.

20.

The allegations of Paragraph Nineteen are denied.

21.

The allegations of Paragraph Twenty are denied.

22.

The allegations of Paragraph Twenty-one are denied.

23.

The allegations of Paragraph Twenty-two are denied.

24.

The allegations of Paragraph Twenty-three, and all of its subparts a-f, are denied.

WHEREFORE PREMISES CONSIDERED, the Defendants request that the Complaint filed herein be dismissed with prejudice and that the Defendants be awarded all costs associated with defending this action.

Respectfully submitted this the 19th day of June, 2001.

THE CITY OF JACKSON, MISSISSIPPI

BY: TERRY WALLACE
CITY ATTORNEY

BY: /s/ J. Anthony Williams
J. Anthony Williams, MSB # 8787
Deputy City Attorney

City of Jackson

Department of Personnel Management

POLICY AND PROCEDURE

Performance Pay Plan

1. PURPOSE

To provide a compensation plan that will attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability.

2. RESPONSIBILITY

2.1 The Mayor, or designee, is responsible for the overall administration of the city's compensation program with primary administrative responsibility within the Department of Personnel Management.

2.2 The Director of Personnel Management is responsible for overall maintenance of the plan. The Department of Personnel Management will conduct periodic salary surveys to ensure that salaries remain competitive with external markets and job analyses to ensure equitable internal alignment, and will recommend adjustments and/or revisions as are appropriate subject to approval by the Mayor and Council.

3. PAY PLAN DESCRIPTION

A schedule of rates, pay ranges, and salary steps for each classification shall be established upon recommendation of the Mayor and approval by the Council. The base pay rates for individual positions are valued based upon external market and internal alignment considerations.

3.1 Steps. A total of five whole steps and four half steps comprise the pay plan. Steps 1,2,3,4, and 5 respectively denote the various whole steps in the pay range. Steps

1.5,2.5,3.5, and 4.5 respectively denote the various half steps in the pay range. A two and one-half (2.5) percent incremental increase exists between half steps and a five (5.0) percent incremental increase exists between whole steps.

3.2 Salary. For purposes of this pay plan, salary is defined as the base rate of pay for an employee and may be expressed as a semi-monthly rate for monthly employees who receive semi-monthly pay checks, a session rate for employees who are compensated per session worked, a daily rate for employees who are compensated per days worked, or an hourly rate for weekly paid employees. Additional or temporary pay for special assignments is not included in the base rate of pay as used in this definition of salary.

3.3 Semi-monthly Salaries. All compensation rates are established on the basis of a full-time position unless otherwise designated, and shall be deemed to include pay in every form.

3.4 Weekly Paid Salaries. Compensation for weekly paid employees is based on an hourly rate and shall be deemed to include pay in every form. Conversion of an annual salary to an hourly rate equivalent shall be made by dividing the annual salary by 2080, which is considered to be the average number of work hours per annum.

3.5 Salaries of Part-time and Other Employees. The Director of the Department of Personnel Management is responsible for salary plan administration for temporary and other employees and such rates are established by the payment schedule entitled "Alphabetical Listing for Part-time and Other Employees". Rates have been established pursuant to applicable federal and state requirements.

3.6 Step 1. Step 1 shall normally be paid upon initial employment, promotion, or reclassification into a five- (5) step pay range. An employee may be hired or promoted at a step other than Step 1 but not higher than Step 1.5 based upon the recommendation of the Department Director. Such

recommendation must be supported by documentation of detailed justification considering factors such as experience, education, certification, specialization, market conditions.

3.7 Step Advancement. Advancements through the steps will be based upon job performance. An eligible employee shall be considered for step advancement on the employee's review date. The effective date for performance increases for which employees become eligible in fiscal years beginning October 1, 1999 shall be the first day of the first pay period following each employee's review date.

3.8 Step Advancement Not Automatic. Advancement through the steps is not automatic but shall be conditioned upon successful job performance in the position occupied by an employee.

3.9 Awards. Awards under the pay for performance plan shall be established at 0% for an "unsatisfactory" or "unacceptable rating", up to 2.5% increase for an "achieves requirements" rating and up to 5.0% increase for an "exceeds requirements " or "outstanding" rating. A 2% increase is established for employees whose salaries are at Step 5 or beyond of the pay range for a rating of "achieves requirements," "exceeds requirements," or "outstanding."

3.10 A performance rating of "unacceptable" will result in a follow-up review six months later. The review date will not change as the result of a follow-up review. If such review results in a subsequent rating of "achieves requirement", the employee is eligible for up to a 2.5% increase.

3.11 Procedure for Salary Step Advancement after 9/30/99. Sixty (60) days prior to each employee's review date, the department Director shall be advised by the Personnel Director, in writing, that the employee will be eligible for consideration for a salary step advancement. The Department Director shall in turn advise the Personnel Director, in writing, prior to the employee's review date whether or not the employee is being recommended for advancement to the

next higher whole step or next higher half step of the pay range. The Department Director shall also initiate a personnel action form (PER-3), along with the original of the completed Employee Performance Appraisal form, recommending the step advancement following review. The Personnel Director shall process all recommended personnel action forms (PER-3) for all anniversary step/half step advancements. Salary adjustments will be effective the first day of the first pay period following each employee's review date.

3.12 Review Date. For civilians, the anniversary date of hire or adjusted hire date or the anniversary date of promotion or demotion which is effective 10/01/98 or later. Review dates will be adjusted due to extenuating circumstances, such as reinstatement of employment, lengthy absences or transfer to the Civil Service Competitive Class. This section is not intended to be in conflict with any other section of this policy, which references the definition of review date.

For uniformed fire and sworn police, October 1, 1998 through February 28, 1999, the review date was based on the anniversary date of entry into service or the anniversary date of a promotion or demotion which was effective 10/01/98 or later. The pay plan was revised for uniformed fire and sworn police March 1, 1999. See Working Procedure - Police/Fire Pay Plan Revision dated March 1, 1999.

3.13 Lateral transfers, reassignments, reclassifications or special assignments will not change the review date.

3.14 Hire Date. For most employees, the hire date is the date of employment. Exceptions occur upon reemployment or upon a change from non-benefit status to benefit status. When an employee leaves city employment and is rehired more than one year after the date of separation, the hire date is the date of most recent employment. When an employee changes from employment in a non-benefit status to employment with full benefits, the hire date is changed to reflect the date of employment with full benefit status,

including Public Employees Retirement System (PERS) eligibility.

3.15 Adjusted Hire Date. When an employee leaves city employment and is rehired within one year of the date of separation, the employee is reinstated and the hire date is adjusted for the amount of time the employee was gone. Example:

Hire Date:	01/01/95
Separation:	05/14/96
Return:	10/01/96
Adjusted Hire Date:	05/21/95*

*Employee was gone 140 days. 140 days are added to the hire date to determine the adjusted hire date.

3.16 Tenure. Length of service will be used in the first year of the pay plan to determine placement in the plan. Thereafter, job performance will determine advancement through the steps.

3.17 Eligibility - All employees in Ranges 1 through 38 and 85 through 102 are eligible to participate in the performance pay plan, except those restricted by federal and state guidelines.

3.18 Absence from City Service. For purposes of this policy and procedure, any employee that is absent from city service on any approved leaves for more sixty (60) work days will have his/her review date adjusted by the number of days absent.

3.19 Absence at Time of Review. A properly executed Employee Performance form is required for salary step advancement after 09/30/99. If an employee's absence precludes timely execution of such form, any performance pay increase will be delayed until such form is properly executed, and any resulting increase will be effective the first

day of the first pay period following the completion of the delayed performance appraisal form.

4. PAY PLAN PHILOSOPHY AND IMPLEMENTATION

The city's practice is to compensate employees in accordance with the city's financial condition. In determining the city's financial condition, the city will consider competing service priorities, reserves, availability of funds, revenue growth and the Council adopted budget policies.

4.1 Initial Placement First Year FY'98/99. Placement into the pay plan shall be established by tenure as of 9/30/98. Employees with less than 5 years of city service will be placed at Step 1 of the pay plan if Step 1 would provide at least a 2% increase in salary. Employees with city service of 5 years or more will be placed at Step 1.5 if Step 1.5 would provide at least a 2% increase in salary. Exceptions: Employees who do not place at Step 1 or Step 1.5 based upon their current salary will be placed a the closest step which provides at least a 2% increase within the salary range. Employees whose salaries currently exceed the Step 5 rate will be granted a 2% increase in salary. All other employees will receive a 2% increase in salary, unless specifically excepted by this plan.

4.2 Exceptions to pay increases during initial placement in the first year FY 1998-1999.

The pay rates of individuals in the following classifications shall not be increased by this pay plan:

City Council President
Tourism Communications Coordinator
City Council Member
Tourism Manager
Election Commissioner
Tourism Marketing Assistant
Intern (PT)
Tourism Marketing Manager

Mayor of Jackson
Tourism Projects Coordinator
Tourism Account Executive
Tourism Receptionist/Clerk
Tourism Administrative Assistant
Tourism Sales Assistant
Tourism Administrative Manager
Tourism Sales Manager
Tourism Assistant Manager
Tourism Services Coordinator
Tourism Services Manager

In addition, individual rates set at the federal minimum wage and funded by federal grants shall not be increased by this pay plan.

4.3 Advancement Beyond Initial Placement. Consideration for subsequent step advancement shall coincide with a performance appraisal process which will occurr approximately one year from the employee's review date.

4.4 New Hires. Employees hired or reemployed shall be compensated at Step 1 but not higher than Step 1.5 based upon the recommendation of the Department Director. Such recommendation must be supported by documentation of detailed justification such as experience, education, certification, specialization, market conditions.

4.5 New Hire Adjustments. Employees hired into the city service between October 1, 1998 and September 30, 1999 whose starting salaries are below Step 1 will have an adjustment to salary made on October 1, 1999 which will place them into Step 1 or the appropriate step of the pay plan implemented October 1, 1998.

4.6 Promotions. Employees with tenure less than 5 years as of 09/30/98 who are promoted between the period of October 1, 1998 and September 30, 1999 with promoted salaries below Step 1 will have an adjustment to salary effective October 1, 1999 which will place them on Step 1.

Employees with tenure equal to or more than 5 years on 09/30/98 who are promoted between October 1, 1998, and September 30, 1999, with promoted salaries below Step 1.5, will have adjustments to salary effective October 1, 1999, which will place them on Step 1.5. Review dates for promotional employees will be adjusted to the effective date of promotion

4.7 Reinstatement. In the case of an employee who is reemployed within a one year period, such employee shall be reinstated at the same range and same step. Consideration for subsequent movement will occur on the review date or adjusted hire date.

4.8 Reemployment. If an employee is reemployed with the city, the employee's review date is the adjusted hire date.

4.9 Reclassification. Employees whose positions are reclassified to a higher range shall normally be placed in the appropriate range at the next step closest to their current salary which provides at least a 2% increase. No salary adjustments will be made when positions are reclassified to the same or lower range.

4.10 Demotion. In the event of demotion from a non-appointive position, the employee's pay will be reduced to the same step of the new pay range to which he/she is demoted. (Example: Step 2 to Step 2, Step 2.5 to Step 2.5). In the event of demotion from an appointive position to a classification previously held by the employee, the employee's pay will be set at the step in the demoted range which the employee would have attained, assuming the same performance ratings since the promotion, and the employee will retain the review date previously held in the lower classification.

4.11 Salary Adjustments Due to Promotion. In the case of an employee who is promoted, said employee may be advanced to the next higher step in the promoted pay range that provides a minimum 5% increase. An employee promoting to Step 1 may be considered for advancement up to

Step 1.5 upon recommendation of the Department Director and the Director Department of Personnel Management and approval of the Mayor or designee providing no inequity is created, considering factors such as experience, education and certifications. Further step advancement is contingent upon successful job performance and on an employee's newly established review date.

5.0 FY1998-1999 SALARY GUIDELINES

Salaries upon hire, promotion, demotion, reclassification or other personnel actions between the period of October 1, 1998 and September 30, 1999 will be determined according to previous provisions of this pay plan, unless the resulting salary would create an inequity considering factors such as experience, education and applicable certifications. When an inequity is created, the following guidelines are to be followed:

5.1 Starting Salaries of New Hires and Promotions. The rate of pay for newly hired or promoted employees should be at the period amount (refers to the old minimum rate established under the previous pay plan) of the range. The starting rate may be above the period amount but not above Step 1 provided the following conditions are met: (1) currently budgeted funds must be identified to offset the initial salary; and (2) the new salary must be equitable with the salaries of incumbents, considering relative skills and abilities, training, experience, and applicable certifications.

5.2 Demotion. In the event of a demotion, pay will be aligned at the level that would have been attained if the employee had never occupied the higher classification.

5.3 Reclassification. Employees whose positions are reclassified to a higher range shall normally be placed in the appropriate range at the next step closest to their current salary which provides at least a 2% increase. During the 1998-99 fiscal year, when such an employee has already received the pay plan implementation increase, the new rate

will be the rate the employee would have attained if the reclassification had occurred prior to the pay plan implementation increase. Employees whose positions are reclassified to the same or lower range shall not receive a salary adjustment unless equity requires a salary increase.

6. JOB ANNOUNCEMENTS

All job announcements will be posted with a beginning salary rate reflecting the period amount as a beginning salary. Job postings after October 1, 1999 will post Step 1 of the pay plan as a starting rate.

7. EFFECTIVE DATES:

7.1 This procedure is effective upon Mayor approval.

7.2 Pay For Performance will begin on October 1, 1999.

7.3 Pay Increases. All salary increases under the performance pay plan shall be effective the the first day of the first pay period following each employee's review date.

8. AMENDMENT AND TERMINATION OF THE PLAN

While it is intended that the performance pay plan will become an integral part of the city's compensation policy, the city reserves the right to terminate, suspend or amend the plan, in whole or in part, from time to time, as conditions warrant. Any plan termination or suspension will occur at the end of a fiscal year.

9. UPDATES/REVISIONS TO THE PLAN

Revisions to this plan will be made consistent with the provisions contained in Section 2.2 of this policy.

10. AUTHORITY:

Approved:

[signed]

Mayor Harvey Johnson, Jr. 4/29/99

[signed]

Dr. Otha Burton, City Administrative Officer

4/29/99

[signed]

Dr. George Terry, Director of Personnel Management

4/28/99

[signed]

Mr. Terry Wallace, City Attorney 4/29/99

POLICE/FIRE PAY PLAN REVISION

MARCH 1, 1999

Working Procedure

A. REVISED STEPS

The pay plan implemented 10/01/98 is being revised for uniformed fire and sworn police classifications March 1, 1999. The strategy for implementing the following revisions is to place each employee's salary and review date at the point which would have been reached if the revisions had been implemented on 10/01/98. The revised steps are attached.

B. PLACEMENT ON REVISED STEPS

1. Placement in the revised pay plan is based on each employee's pay, rank and time in service[1] as of 09/30/98, with salary set as follows:

a. On Step 1 if the employee has less than 5 years service on 09/30/98 and if the resulting salary is at least 2% more than the employee's salary as of 09/30/98; or,

b. On Step 1.5 if the employee has 5 or more years of service on 09/30/98 and if the resulting salary is at least 2% more than the employee's salary as of 09/30/98; or,

c. On the nearest step or half-step for which the resulting salary is at least 2% more than the employee's salary as of 09/30/98; or,

d. At a level which will result in a salary 2% more than the employee's salary as of 09/30/98.

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[1] Time in service is the number of years between the service date and September 30, 1998. Service date is the date of entry into the academy adjusted, as applicable, for gaps in service. When a lapse in service is one year or more, the service date will be the date of reemployment.

2. When the employee's status (e.g., rank or assignment[2]) as of 3/1/99 is different from that of 09/30/98, further adjustments are made to determine the employee's pay within the revised plan.

3. Attorney general opinion letters state that retroactive pay does not comply with the state constitution. Accordingly, no retroactive pay will be authorized under this revision.

4. In a few cases employees received pay plan implementation increases prior to March 1, 1999, which placed them slightly above their appropriate step in the revised plan. This occurred due to rounding. When this occurs, no pay is retracted. The difference will be made up in the 1999-2000 fiscal year at which time the employee will be eligible for a performance increase to the next half step for "achieves requirements" or the next two half steps for "exceeds requirements" or "outstanding."

C. REVIEW DATES

1. Revised review date of a sworn police or uniformed fire incumbent is the earliest of

(a) The incumbent's own service date; or,

(b) The service date of any other incumbent in the same rank who has less time in service but whose service anniversary occurs earlier in the fiscal year.

2. The anniversary of a promotion or demotion which occurs after October 1, 1998, will become the employee's new review date.

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[2] Certain assignments result in salary adjustments. In Police, a salary adjustment occurs upon assignment as Commander. In Fire, a salary adjustment occurs upon reassignment into or out of emergency services non-exempt positions.

C. EFFECTIVE DATES[3] OF INCREASES

Placement in the 3/1/99 revised steps will result in higher salaries for most, but not all, police and fire incumbents, when compared to placement in the 10/01/98 steps. When an incumbent is eligible for a higher salary due to placement on the revised steps, the effective date of the increase will be determined as follows:

1. When the initial review date of a sworn police or uniformed fire incumbent is October 1 through February 29, the effective date will be March 1, 1999.

2. When the initial review date is after February 29, the effective date will be the first day of the first pay period following the initial review date. However, Master Police Officers with a revised review date of September 1 are addressed below in C5.

3. When a new review date was set due to a promotion between October 1, 1998 and March 1, 1999 the effective date will be March 1, 1999.

4. Performance increases will be effective the first day of the first pay period following the review date, following normal city procedure.

5. A class of Master police Officers has a revised review date of September 1, and under C2 above would not be placed in the revised plan effective March 1, 1999. However, this

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[3] Effective date is the date when a pay increase is applied to regular, non-overtime hours. Review dates on the first through the fifteenth of the month will be effective on the sixteenth. Review dates on the sixteenth through the last day of the month will be effective on the first of the following month. Increases effective on the sixteenth of the month will be received in the pay check distributed on the last day of the month. Increases effective on the first of the month will be received in the pay check distributed on the fifteenth of the month.

class will be placed into the revised plan on March 1 in recognition of two unique circumstances: 1) the rank of Master Police Officer is attained by tenure alone, and 2) the Master Police Officers with a review date of September 1 have more tenure than all lower ranking police officers. The group of Master Police Officers with a revised review date of September 1 will be placed in the revised plan effective March 1, 1999; their performance expectations will be set September 1, 1999; and, they will be eligible for a performance increase following their first performance evaluation on September 1, 2000.

D. ADJUSTMENTS FOR STATUS CHANGES

1. Promoted/demoted since 10/1/98.

An employee promoted since 10/1/98 will be placed in the revised plan at the nearest step that will result in at least 5% more than the salary the employee would have attained in the revised plan prior to promotion. Next review date of an employees promoted or demoted since 10/1/98 is the anniversary of the date of promotion/demotion. Future promotions/demotions will be made effective on the first or 16th of a month, in order to avoid conflicting effective dates.

2. Acting on 9/30/98.

Placement in the revised plan for employees acting out of rank[4] on 9/30/98 is based on salary in their attained rank.

3. Acting on 2/28/99.

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[4] Acting out of rank refers to non-permanent assignments to a rank above attained rank which are entered into the JIMS employee master file. This does not apply to acting out of rank in Fire Emergency Services Division (ESD). In Fire ESD, acting out of rank is not entered into JIMS employee master file; rather it is entered into JIMS history only and is applied manually through a "Fixed Pay" in Timekeeping.

After placement in the revised plan, acting pay is added to attained rank pay for employees who are acting out of rank on 2/28/99.

4. Day Shift Differential[5] (Fire Only)

For purposes of determining revised plan placement, Day Shift Differential is not included in 9/30/98 Base Pay. After placement in the revised plan, Day Shift Differential is added to attained rank pay for employees who are working day shift as of 2/28/99. Supplemental reports will show 9/30/98 salary less day shift differential. Supplemental reports will show 3/1/98 salary to include day shift differential for employee working day shift as of 2/28/99. Fire ranks which are exempt from the FLSA, i.e., above Fire Captain, do not qualify for the day shift differential, with the exception of District Chief in Arson.

E. EXCLUDED CLASSIFICATIONS

The classifications of Fire Arms Instructor, Warrant Officer, Bailiff and Park Ranger are excluded from these revisions. Those classifications will be administered under all conditions stated in the pay plan implementation of October 1, 1998.

F. POLICE RECRUITS

Under the revised plan, pay and classification of police recruits will be handled differently.

On the day the recruit begins the academy, the classification will be Police Recruit, Pay Range 95. At that time, salary will be placed at Step 1 of Range 95 for recruits without state certification or with less than one year experience as a state certified officer. State-certified recruits with at least one year

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[5] Day Shift Differential is a 2.5% premium added to the base pay of non-exempt uniformed fire personnel assigned to a 40-hour schedule.

experience as a state certified officer will start the academy at Step 1.5 of Range 95.

At graduation, salary for all recruits will advance a half step. Those who started the academy at Step 1 will advance to Step 1.5. Those who started the academy at Step 1.5 will advance to Step 2. Classification and pay range will not change.

Upon completion of field training, performance expectations will be set and a PER-3 will be processed to set the next review date at one year following the date the employee started the academy. There will be no change in classification, pay range or salary.

One year after starting the academy the employee's performance will be reviewed. Satisfactory or better performance will result in a reclassification to Police Officer, and salary will be placed at Pay Grade 96, Step 1.

THE OLDER AMERICAN WORKER AGE DISCRIMINATION IN EMPLOYMENT REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964

JUNE 1965

LETTER OF TRANSMITTAL

Washington, D.C., *June 30, 1965.*

Hon. John W. McCormack,
Speaker of the House of Representatives.

Hon. Hubert H. Humphrey,
The President of the Senate.

Sirs:

I have the honor to transmit to the Congress herewith the study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination," with my recommendations on this subject, as required to be submitted by June 30, 1965, under Section 715 of the Civil Rights Act of 1964 (Public Law 88-352).

This report is based upon special studies conducted in response to this directive of the Congress and upon extensive research done earlier, including the work of the President's Council on Aging. The special studies conducted for this report are contained in a separate volume of research materials.

The report presents recommendations for dealing with arbitrary discrimination in employment because of age and with the basic factors which impede the reemployment of displaced workers as they grow older. It also discusses measures which should be considered for

the fuller use of the talents and time of older persons in private enterprise and in community service.

It is my sincere hope that the report will provide the impetus for effective measures in this most deserving and much neglected cause.

Sincerely,

/s/ W. Willard Wirtz

W. Willard Wirtz,
Secretary of Labor

CONTENTS

Page

I. Introduction .....___

II. Findings .....___

Factors Which Might Tend to Result in Discrimination in employment Because of Age .....___

A. Discrimination Arising from Dislike or Intolerance ..... ___

B. Arbitrary Discrimination: Specific Age Limits ..... ___

C. The Necessary Recognition of Forces of Circumstances .....___

D. Institutional Arrangements that Indirectly Restrict the

Employment of Older Workers .....___

The Consequences of Such Discrimination
on the Economy and Individuals Affected ...___

A. The Consequences to the Economy.....___

B. The Consequences to the Individual.....___

III. Conclusions and Recommendations.....___

Action to Eliminate Arbitrary Age
Discrimination in Employment .....___

Action to Adjust Institutional
Arrangements Which Work to the
Disadvantage of Older Workers .....___

Action to Increase the Availability
of Work for Older Workers .....___

Action to Enlarge Educational
Concepts and Institutions to Meet the
Needs and Opportunities of Older Age .....___

Research Materials – Under Separate Cover

I. Introduction

The poet Browning could write of growing old, and say of it: "The best is yet to be / The last of life, for which the first was made."

A century later, reality has still not caught up with that poetry. Although scientists and doctors have extended life with almost incredible ingenuity, and have eased some of the physical pains of old age, there has been no comparable invention regarding the uses of these long years of vigorous active life that now commence at the point where, until almost this generation, life began rapidly to ebb. Yet, this is in truth a miracle, a new age of man; and it is hardly to be wondered that it has brought with it new problems as yet unsolved, indeed as yet hardly examined.

The Social Security Act of 1935 established an historic precedent; but security is no more than a foundation for satisfaction, and not itself enough. Subsequent legislation – various housing acts, parts of the antipoverty program, provisions to cover some of the costs of illness that comes with age – has recognized the right to grow old in decency. Yet decency, too, is meager reward.

Meeting the problems associated with advancing years remains, accordingly, a pressing piece of unfinished business for those who consider it not heresy, but the fullest reverence, to include the perfectibility of life within the human competence.

There is, in this connection, no harsher verdict in most man's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is "You're too old," that a man turns away, in another poet's phrase, finding "nothing to look backward to with pride, nothing to look forward to with hope." If that verdict is fair on the facts, it can only

be viewed as part of life's bruising mystery. But if that verdict is unfair, or unnecessary, it is part of man's inhumanity to man that can be and must be stopped.

All of this is the context of the Congress' provision, in Section 715 of the Civil Rights Act of 1964, that –

> The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected. The Secretary of Labor shall make a report to the Congress not later than June 30, 1965, containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable.

This report is presented in response to this requirement.

The Congressional directive was carefully and precisely worded, avoiding prejudgment of the influence of discrimination on the employment of older workers, recognizing subtly that not all discrimination in this area is "arbitrary," asking a broad consideration of all "factors which might tend to result in discrimination" in employment because of age, and requesting a report on the consequences of these factors both on the economy and on the individuals affected. These guides have shaped this report.

The development of responsible and effective public policy regarding discrimination based on age requires as steadfast and unfearing confrontation of reality as did the development of a national policy opposed to discrimination based on race, color, religion,

sex, or national origin. But there is an essential difference.

The Nation has faced the fact – rejecting inherited prejudice or contrary conviction – that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. This would be easy – and wrong.

The gist of the matter is that "discrimination" means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving – for example – race. It means in connection with the age question, furthermore, several different things.

Employment discrimination because of race is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job. There is significant discrimination of this kind so far as older workers are concerned.

The most closely related kind of discrimination in the non-employment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*. It is this which Congress refers to, in Section 715 of the Civil Rights Act, as "arbitrary discrimination."

A third type of discrimination – which should perhaps be called something else entirely – involves decisions not to employ a person for a particular job because of his age *when there is in fact a relationship between his age and his ability to perform the job*. The only reason for marking out this third area is that it

clearly does exist so far as the age question is concerned, but does not exist so far as, for example, racial or religious discrimination are concerned.

There is finally, so far as age is concerned, that kind of "discrimination" which results when an employer turns an older man or woman away, not because of concern about the individual's ability to perform the work, but because of programs and practices actually designed to *protect* the employment of older workers while they remain in the work force, and to provide support when they leave it or are ill. Seniority and promotion-from-within systems, and pension and insurance programs, are a mark of civilization. They vastly enhance the dignity, the security, the quality of the later years of life in the United States. At the same time, ironically, they sometimes have tended to push still further down the age at which employers begin asking whether or not a prospective employee is too old to be taken on.

With these distinctions between various kinds of "discrimination" in mind, it is important, next, to recognize that there are *two* sets of value judgments to be made regarding any particular kind of discrimination based on age.

The most obvious of these judgments must be made in terms of the justification for particular employment practices in relationship to the efficient operation of a particular enterprise and of the economic system as a whole. This includes the value to the system of making maximum use of the Nation's full manpower potential, of each individual's full capacity.

What is less obvious, indeed still unclear, is the extent to which account is properly taken of the value *to the individual* of opportunity which the most "efficient" operation of the system as a whole might not provide. The prevailing assumption is that people are created for

jobs, not jobs for people. The difference between a great and a lesser society – particularly one which prides itself on being individual-oriented rather than system-oriented – includes its readiness to review this traditional assumption. The point is clearest in the case of an older person whose economic value becomes marginal in traditional market place terms, but for whom employment is the difference between life's having meaning and no meaning. This is not just a matter of "human" concern for the individual. There may well be involved a choice for the rest of us between paying, as customers, a few cents an hour of that individual's wages (and getting the value of his productive potential) or, in the alternative, paying, as taxpayers, the full amount of his "welfare" upkeep (and getting nothing in return).

It is proper reminder, as part of a preface to policymaking regarding a question involving age, that while each of us is growing older as an individual we are growing younger (at least for the present) as a whole population.

It is true, on the one hand, that the absolute number of older persons – and therefore the number of persons who may be the victims of age discrimination in employment – is growing rapidly.

* There are today 22 million men and women between the ages of 45 and 55, almost 17 million between the ages of 55 and 65, and 18 million 65 and over.

* These numbers are all significantly greater, both in absolute terms and as a proportion of the entire adult population, than was true ten years ago, or twenty, or fifty.

* By 1975, there will be almost 94 million men and women between 45 and 55, about 20 million between 55 and 65, and about 21 million 65 and over.

Because young persons go to work later than they used to, and more and more older women are going back to work, the number of workers age 45 and over continues to grow; and older workers will still make up more than a third of the work force in the years ahead.

So the problem area is increasing significantly.

At the same time, however, the median age of the population in the United States is going down.

* Half of us are today under 29.
* By 1975, half of us will be under 26.

What this means is that a Nation which already worships the whole idea of youth must approach any problem involving older people with conscious realization of the special obligation a majority assumes with respect to "minority group" interests. This is, to be sure, one minority group in which we all seek, sometimes desperately, eventual membership. Discrimination against older workers remains, nevertheless, a problem which must be met by a majority who are not themselves adversely affected by it and may even be its temporary beneficiaries.

The "discrimination" older workers have most to fear, however, is not from any employer malice, or unthinking majority, but from the ruthless play of wholly impersonal forces – most of them part of what is properly, if sometimes too casually, called "progress."

Over a sixth of the railroad engineers in the United States are 65 or older. But airline transport pilots must retire at 60. Astronauts are not hired after 35.

The same advancing science that is extending people's productive lives is contributing to putting lower age limits on employment.

This results partly, at least for the present, from the increase in educational requirements for many jobs, and from the fact that older workers today have less formal education, on the whole, than younger workers.

Among male workers 45 to 54, nearly one-third of those who are white, and almost two-thirds of the nonwhite group, *have not gone beyond the eighth grade*. Among male workers 55 to 64, nearly half of the white group and more than three-quarters of the nonwhite group *have not gone beyond the eighth grade*. This is in sharp contrast to the education of young persons now entering the work force.

Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers – unfairly if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education.

In 1964, about 3½ million workers 45 years old or older were involuntarily unemployed at one time or another. As the number of older workers increases, the problem of their job readjustment and unemployment will be compounded. The achievement of fuller employment opportunity in the economy as a whole will provide more jobs for older workers. At the same time, the pace of changing technology, changing jobs, changing educational requirements, and changing personnel practices increases the need for special efforts if older workers' employment prospects are to improve significantly.

The Findings which follow in this report identify the extent to which there is evidence of age "discrimination" of various kind, particularly "arbitrary" discrimination, as a factor in the unemployment of older workers.

The Conclusions and Recommendations suggest measures which can and should be taken to increase the economic and social well-being of the Nation and the satisfactions of life for millions of older American

workers who will otherwise be the victims of discrimination in employment based on age.

II. Findings

These findings cover the two areas specified in section 715 of the Civil Rights Act of 1964:

Factors which might tend to result in discrimination in employment because of age.

The consequences of such discrimination on the economy and individuals affected.

In each case, the findings relate to the entire range of factors which tend to have adverse effects on the employment of older workers. Some of these factors involve what is properly identified as arbitrary discrimination. Others do not. Yet some of these other factors not only have the same effect as arbitrary discrimination, but are equally susceptible to constructive action.

Factors Which Might Tend to Result in Discrimination in Employment Because of Age

Older workers are in general valued and often prized employees. Almost 97 percent of male workers 45 and over were employed in 1964. Persons over 45 make up almost 40 percent of the U.S. labor force, but only 27 percent of total unemployment, and only 17 percent of all the applicants registered at the public employment service offices. Most older workers who are not at retirement age do get reemployed when they lose jobs.

There is, nevertheless, clear evidence of the Nation's waste today of a wealth of human resources that could be contributed by hundreds of thousands of older workers, and of the needless denial to these workers of opportunity for that useful activity which constitutes much of life's meaning.

The central element identifiable in this situation is the fact of sluggish human adjustment and impersonal

economic accommodation to the present rapid pace of scientific and technological progress.

These findings analyze the extent to which older workers are deprived of useful and profitable activity as a result of each of the four types of discrimination described in the Introduction to this report.

As has already been indicated in the Introduction, we find no significant evidence of the first kind of discrimination – that which is based on the kind of dislike or intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job.

We do find substantial evidence of arbitrary practice in the second category of discrimination – discrimination based on unsupported general assumptions about the effect of age on ability – in hiring practices that take the form of specific age limits applied to older workers as a group.

We find that in the third category, which involves decisions made about aging and the ability to perform in individual cases, there may or may not be arbitrary discrimination on the basis of age, depending on the individual circumstances.

Individual circumstances may similarly lead to arbitrary discrimination in the fourth category that involving institutional arrangements which operate indirectly to restrict the employment of older workers.

A. Discrimination Arising from Dislike or Intolerance

Discrimination in employment based on race, religion, color, or national origin is accompanied by and often has its origins in prejudices that originate outside the sphere of employment. There are no such prejudices in American life which apply to older persons and which

would carry over so strongly into the sphere of employment.

The process of aging is inescapable, affecting everyone who lives long enough. It is gradual, minimizing and obscuring differences among people. At all times there are people of all ages living in close association rather than in separate and distinct social or economic environments. The element of intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers.

It is true that hiring officials are not immune to the brightness, vigor, and attraction of youth, nor always above exploiting these attributes for commercial advantage. But such choices involve preferences *for* one group, rather than antagonism *against* another.

We have found no evidence of prejudice based on dislike or intolerance of the older worker. The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages, rather than around the people as such. This issue thus differs greatly from the primary one involved in discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to ability to perform work.

This is not to say that there is no intolerant prejudice against older persons as such. Determinations not to employ older workers can become deep-seated and even emotional in character. But were this the sole matter, the degree to which it exists would not warrant public concern.

B. Arbitrary Discrimination: Specific Age Limits

The most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications. These

restrictive practices appear in announced employer policies (e.g., in Help Wanted advertisements; or in job orders filed with employment agencies) or in dealings with applicants when they appear in the hiring office.

It has become generally realized that these broad age-limit practices have developed to a point requiring public attention. Twenty States have passed statutory prohibitions of one form or another against them. But there has been no comprehensive study of their scope or effects, and the available information has been largely limited to two surveys (in 1956 and in 1963) of age restrictions placed by employers on job openings filed with local Employment Service offices.

A special study of age limitations in hiring has accordingly been made in connection with the preparation of this report. This study is based on a survey made by the Bureau of Employment Security of the Department of Labor, through the Federal-State Employment Service system. The study covers a sample of over 500 employers, employing half a million workers, in five cities (Baltimore, Indianapolis, Kansas City, Mo., Memphis, and Salt Lake City). These cities are all in States which did not, as of the time of the study (early 1965) have laws against age discrimination in employment. (Indiana has since adopted such a law.) The study includes both employers who file job openings with the Employment Service and others who do not.

The fall study is contained in the volume of research materials which accompanies this report.

This 1965 study, along with other available data and information, permits the following findings.

1. *The setting of specific age limits beyond which an employer will not consider a worker for a vacant job, regardless of ability, has become a characteristic practice in those States which do not prohibit such*

action, to the extent and with the result that in these States:

-- *Over half of all employers are presently applying such limitations, using age limits typically set at from 45 to 55;*

-- *Approximately half of all job openings which develop in the private economy each year are closed to applicants over 55 years of age, and a quarter of them are closed to applicants over 45.*

Almost three out of every five employers covered by the 1965 survey have in effect age limitations (most frequently between 45 and 55) on new hires which they apply without consideration of an applicant's other qualifications. Twenty-seven percent of the employers reported formal upper age specifications for some or all occupations. It was determined on investigation that an additional 30 percent follow such a policy in practice.

The results of this survey are consistent with those in the 1963 Employment Service survey of the job orders filed by employers with the Service in eight cities (Albuquerque, Baltimore, Houston, Indianapolis, Kansas City (Mo.), Louisville, Memphis, Salt Lake City) in States having no laws prohibiting age discrimination. The 1963 survey revealed that about 30 percent of the job orders filed were limited to men and women under 45, and over 40 percent were limited to applicants under 55. A similar study in 1956 in seven other cities had shown even higher percentages of job orders with age restrictions: 40 percent fixed age 45 as an upper limit, and over 50 percent fixed age 55 as the limit.

2. *The establishing by employers of stated age limitations (or, on the other hand, of stated policies against any age limitations) has a direct and marked effect upon the actual employment of older workers, with the result that:*

-- *The proportion of older workers hired by firms with stated upper age limits is half the proportion of older workers hired by firms with stated policies of ruling out age limits.*

-- *The proportion of older workers hired by firms with no stated policy regarding age limitations is significantly smaller than the proportion of older workers hired by firms with stated policies of ruling out age limits, especially with respect to workers 55 and over.*

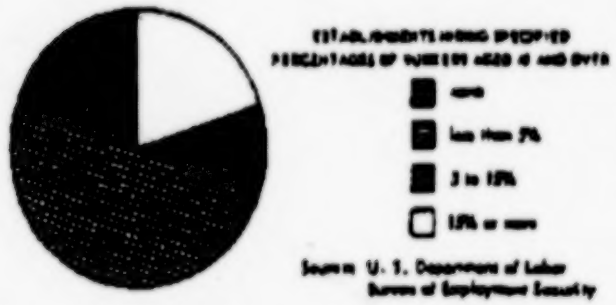
The 1965 survey shows the following:

Older hires as percent of total hire in firms having--

Age of older hires	*Upper age limits*	*No policy on age*	*No age limits*
Total, 45 years and over.	6.9	8.6	13.0
15 to 54 years ...	4.7	6.5	9.5
55 to 64 years ...	1.9	1.8	3.3
65 years and over	.3	.3	.2

A very small proportion of new employees hired today are 45 or older. One-fifth of the employers surveyed hired no older workers at all. (See chart 1.) These facts in themselves indicate, of course, nothing about discrimination.

Chart 1. OLDER WORKERS REPRESENT LESS THAN 5 PERCENT OF NEW HIRES IN MOST ESTABLISHMENTS[1]



[1] Based on Special Survey of Hiring Practices in 5 Cities in 1965

The state of labor supply and demand obviously has an important influence on employer hiring policies. Restrictions tend to be eliminated, eased, or waived when the employer cannot recruit under rigid specifications. The 1965 survey, like earlier surveys, shows somewhat fewer restrictions (i) in skilled occupations, the traditional crafts, and the professional and semiprofessional positions, where there are widespread shortages, and (ii) in the expanding but traditionally lower paid retail sales and service occupations. Age limitations are most frequent for clerical positions and for semiskilled and unskilled work, and for "outside" salesmen. Similarly, the manufacturing industries, with the notable exception of apparel, are hiring relatively few people over 45. Retail stores, hotels, personal and medical service industries, and government agencies are generally hiring older workers in substantially larger proportions.

It is reasonable to expect that present age restrictions would be eased to some extent under conditions of fuller employment. This has happened in the past, particularly in periods of national emergency.

There is no current indication, however, of any general or significant relaxation of present age restrictions in hiring on the basis of prospective overall economic developments alone.

The prospect is, rather, that the continuation of age limitations will have a substantial adverse effect upon the employment opportunities of older workers.

3. *An unmeasured but significant proportion of the age limitations presently in effect are arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements, and are defended on grounds apparently different from their actual explanation.*

Conclusive determination of the extent to which age restrictions are arbitrary would necessitate detailed examination of the reasons for the limitations in individual cases, under carefully established procedures including, almost necessarily, some form of hearing process. No such proceedings were envisaged in Section 715 of the Civil Rights Act, and none have been instituted.

It is apparent, however, from evidence obtained during the course of this study, that a great many age limitation policies are based in fact on considerations quite different from those offered as (and undoubtedly believed to be in many cases) their explanation.

The explanations given by employers for the adoption of age limitations include (as reflected in the 1965 study) a variety of factors:

- -- Physical capability.
- -- A policy of promotion-from-within and accompanying restriction of hiring to younger ages and entry jobs.
- -- Ability to hire younger workers for less money, and concern that older workers' earnings expectations are "too high."

-- Pension plans (costs and provisions), and to a much lesser extent, costs of health and life insurance.
-- Lack of skills, experience, or educational requirements.
-- Limited work expectancy.
-- Training costs and low productivity.
-- Lack of adaptability and undesirable personal characteristics.
-- Desired age balance in the work force.

Physical capability is by far the most prominent single reason advanced for imposing upper age limits.

There are unquestionably *some* jobs involving physical demands so unusual that it represents not only good business sense but common decency not to assign them to workers whose age increases the *possibility* of some weakening of body tissue.

It is relevant, however, in determining the true basis for these age limitations which are explained in terms of physical demands of the work

-- That in 70 percent of the cases of claimed basing of age limits on physical capabilities reported in the 1965 survey, no studied basis for this conclusion was reported;
-- That there is a vast difference between various employers' ideas concerning the age at which physical demands should exclude workers from jobs involving similar duties -- so that in the 1965 survey physical requirements were reported to account for restrictions as low as 25 years of age and as high as 60 for groups of occupations involving comparable physical exertions and demands for strength;
-- That a great many responsible employers do hire older workers for jobs other employers bar them

from on the basis that their age alone disproves their capability.

The very generality of many of the age limitations indicates their character. They exclude all potential new employees above a certain age, without any differentiation among the various jobs which may be involved and with no provision for determination of whether particular applicants might be qualified despite their age.

Further illumination comes from the responses which employees using age limitations made to an inquiry included in the 1965 Employment Service survey concerning the circumstances under which these restrictions might be waived. Labor supply conditions outweigh any other considerations. Many employers using age restrictions indicate a willingness to hire "over-age" workers if they cannot get younger workers, but will not consider them on their merits if the jobs can be filed with younger workers. Some state that older workers would only be hired if their abilities *exceeded* those of younger workers.

The various studies show that upper age limits set on a company wide basis are generally lower than those set for specific jobs. The higher the skill level, and the greater the demand for workers, the higher the age limit; age limits for professional, managerial, and skilled workers are typically set at 50 or higher; for service workers also at 50 or above; for clerical workers and salesmen below 50; and for semiskilled and unskilled below 45. A clear reflection of job market judgment is apparent in the setting of these ages.

4. *The competence and work performance of older workers are, by any general measures, at least equal to those of younger workers.*

The Bureau of Business Management at the University of Illinois in a study of supervisory ratings in

manufacturing establishments in 1954 found that 11 percent of the workers 60 years old and over received excellent ratings for overall performance; only 3 percent received poor ratings. On work quality, 32 percent were rated better than young workers, 60 percent the same and 8 percent poorer.

A 1959 Canadian study of sales persons in retailing showed that workers hired above the age of 40 attained higher performance ratings in a shorter period than workers hired below 30 years of age. They reached their peak performance in their fifties.

Department of Labor studies of factory production work involving physical effort indicate that a slight decrease in productivity occurs after age 45; but that the decrease does not become substantial until age 60. In office or other sedentary work little, if any, decline occurs prior to age 60, and the subsequent decline is minor.

So far as the allegedly key issue of physical capability is concerned, a comprehensive review of available medical and psychological evidences reveals no support for the broad age lines which have been drawn on the basis of claimed physical requirements. To the contrary. The basic research in the field of aging has established that there is a wide range of individual physical ability regardless of age.

The most extensive series of recent studies are those reported by A. T. Welford in 1958 on the basis of the Nuffield Foundation's basic work on aging and human skill, covering the post war period. These studies attribute most of the deterioration of ability to changes in the central nervous system, and indicate that these changes do not affect occupational skills in any significant numbers of cases before age 60.

The Nuffield Foundation studies do point to increasing differences of individual performance with

advance in age. They show, however, at the same time, an increasing capacity of the human system to compensate for diminishing abilities, and a wide range of occupational requirements which falls well below the usual range of personal capacities subject to these requirements. The scientific findings, if they were to be translated into hiring policies, would clearly rule out policies based on rigid age limits.

One of the higher hiring rates for older clerical workers found during the course of the 1965 study is in the postal service, where appointments are made, under Civil Service regulations, without regard to age. Although postal clerks are engaged in some of the most physically demanding of the clerical occupations, a study made by the Bureau of Labor Statistics of the relative performance of Federal mail sorters in 1963 showed an equal performance level for the older workers.

Here again, the strongest indication of the lack of real basis for most age limitations is the demonstrated willingness of so many American employers to consider older workers on their merits as individuals and to hire them. Although one out of every five of the employers included in the 1965 Employment Service survey hired no new employees among applicants over 45 years of age, another one-fifth hired at least 15 percent in this age group. Many of these firms reported an active policy of recruiting older persons, and praised them for performance and dependability.

It is significant that employers and supervisors often rate their own older workers high on over-all performance, but are at the same time reluctant to hire new employees in the same age brackets.

5. *Arbitrary age discrimination is significantly reduced in States which have strong laws, actively administered, directed against discrimination based on age.*

There are today twenty States which have adopted statutes prohibiting discrimination in employment on the basis of age. (See chart 2.)

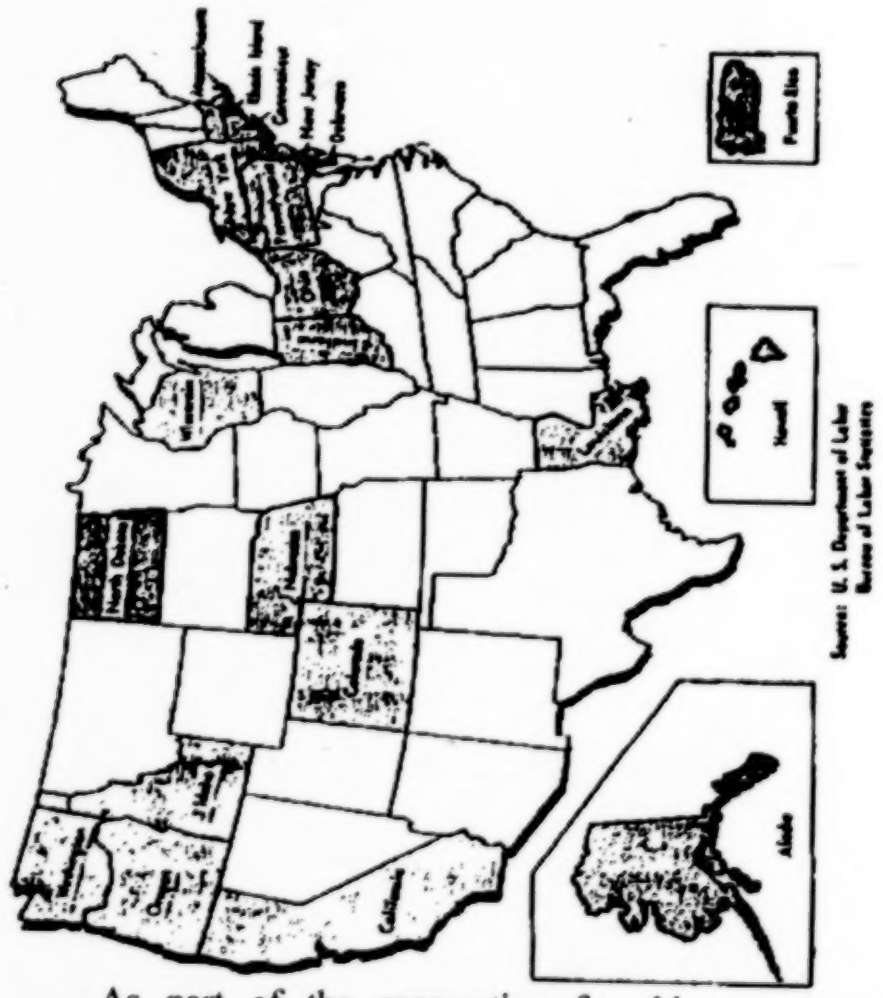
The State laws against discrimination in employment on account of age cover about half of the nonagricultural employment of the U.S. and Puerto Rico:

Colorado (1903)	Alaska (1960)
Louisiana (1934)	Delaware (1960)
Massachusetts (1937 and 1950)	California (1961)
	Ohio (1961)
Rhode Island (1956)	Washington (1961)
Pennsylvania (1956)	New Jersey (1962)
New York (1958)	Nebraska (1963)
Connecticut (1959)	Hawaii (1964)
Wisconsin (1959)	Idaho (1965)
Oregon (1959)	Indiana (1965)
Puerto Rico (1960)	North Dakota (1965)

All but three of these laws have been passed since 1955; three were passed in the 1965 legislative sessions. Typically, they apply to employers, employment agencies and labor organizations, with certain exceptions for domestic service, agriculture and small employers. They ban discriminatory practices on account of age, including refusing to hire, discharging, or discriminating in compensation or other terms or conditions of employment. Over half of the States forbid including age limitations in Help Wanted ads or inquiries by employers and employment agencies. Most of these laws are administered as part of Civil Rights legislation.

CHART 2. STATES WITH LAWS PROHIBITING AGE DISCRIMINATION IN EMPLOYMENT, 1965

[Sideways Page customer copy p. 12]



As part of the preparation for this report, a conference of State administrators of age discrimination laws was convened by the Secretary of Labor, in September 1964, to seek their views on the effectiveness of such legislation. This was followed by detailed inquiry into experience in seven States. Experience under these laws is summarized in a special analysis contained in the separate volume of research materials which accompanies this report.

There is clear evidence that in those States where a firm position has been taken, at least the obvious forms

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of discrimination have diminished, and job opportunities for middle-aged and older workers have increased. The existence of a State law with penalties for violations has made efforts to resolve complaints more effective than has been the case where there have not been such penalties. Age limitations have virtually disappeared from Help Wanted ads in the States which have prohibited them.

However, inadequate funds and staff have limited the effectiveness of these laws in most States. Some have not been implemented at all. In some cases, the broad responsibilities of State agencies to deal with cases of discrimination on account of race, color, or religion, as well as age, have resulted in administrative burdens too large for the staffs that were authorized.

Despite these administrative limitations, the State agencies report numerous cases in which complaints have been adjusted in conferences with employers, with the result that older persons were retained or accepted by employers. More than two-fifths of the complaints from workers who believed that they had been discriminated against because of their age were found to involve a sufficient degree of arbitrary discrimination to warrant administrative action to bring the employer into compliance.

6. *The Federal Government has adopted a broad and effective policy of nondiscrimination on the basis of age so far as its own employment policy is concerned, and has extended this principle to cover Government contractors.*

The Federal Government's own established policy of hiring on merit through civil Service procedures, without regard to age, is of long standing. Its compulsory retirement age is 70, with occasional exceptions.

Executive Order 11141, issued by President Johnson on February 12, 1964, established a Federal

policy against discrimination in employment on account of age by Federal contractors and subcontractors. The Order includes no enforcement provisions and no special administrative machinery for dealing with complaints, providing only that Federal Departments and agencies "take appropriate action to enunciate the policy." Procurement regulations have been amended and the Order has been given wide circulation among larger contractors. Their responses have indicated that the Order stimulated reappraisal of hiring policies respecting age. There have been only a few complaints from individuals and where they have involved violations of the order they have resulted in changes in employer policies.

Executive Order 11141 includes a special provision regarding the elimination of age limitations from employment advertising. A check of Help Wanted ads of Federal contractors appearing in leading newspapers in 25 cities in the spring of 1965 indicates that less than 5 percent had age specifications.

C. The Necessary Recognition of Forces of Circumstance.

Consideration has been given in the preceding section to the arbitrariness of specific age limitations, indiscriminately applied. It is equally important to recognize the force of certain circumstances which unquestionably affect older workers more strongly, as a group, then they do younger workers.

There can be many reasons why a particular older worker does not get a particular job, and some of them can well be associated with that worker's age. There are differences among people, and some individuals, for a variety of reasons, become less employable as they grow older, just as others become more employable as they grow older.

1. *The health factor is different as between older and younger workers.*

A particular worker may develop a serious health problem which limits his availability for a wide variety of jobs. This health problem would, in the case of a younger worker, have similar effect. But if it is the kind of health problem that is more likely to be serious among older workers, then older workers affected by it are more likely to be rejected for certain jobs on this account.

This in no sense means that it would be reasonable to exclude all older workers from consideration for such jobs because *as a group* they are more subject to specific health problems associated with growing older. But it does mean that when older workers get considered on their merits, a certain proportion of them fail to qualify.

The medical and psychological findings concerning the abilities of older workers to do specific tasks have already been cited. With increases in the range of individual differences among workers as age advances, it is inevitable that some will fail to meet requirements.

Studies relating health and age have generally found fewer acute illnesses among older than among younger workers, but show that the older ones are more prone to chronic conditions. Chronic conditions may not prevent the employed from continuing to work, but may well result in a higher rejection rate (for example following physical entrance examinations) among unemployed older workers.

The health of the older worker (as well as of the younger) is considerably poorer among the unemployed than among the employed. In 1961-62, days of restricted activity (due to acute conditions) among unemployed 45-64 year olds were twice those of the employed (8.8 versus 4.0). Ten percent of the employed men aged 45-64 had major activity limitations due to chronic conditions; 26 percent of the unemployed had such limitations. Differences between older and younger workers are similarly more pronounced among the unemployed.

2. *The educational attainment of older workers – or the inadequacy of it – is often a bar to their employment for specific kinds of work, either because of inability to meet specific job requirements or employer preferences, or because younger workers meet them better.*

The fact that most older workers obtain new employment despite rapid technological change indicates the value employers place on their experience, capacities, and stability. But those with inadequate education have far less success in obtaining work than those who are well prepared.

Unemployment rates are inversely related to education in all age groups. Thus, in March 1964, 7 percent of the white male workers 45 years old and over with less than 8 years of schooling were unemployed as compared with 5.4 percent of those who finished elementary school, 2.6 percent of those who finished high school and 1.1 percent of those with 4 or more years of college. The same pattern held true for white women workers.

The pattern for nonwhite workers, though similar, showed less difference because of other factors which result in higher unemployment rates in the nonwhite group regardless of their education: 7.5 percent of the nonwhite men with 8 years of schooling or less were unemployed as compared with 6.3 percent of those who finished high school; percentages for nonwhite women workers in this age group were 6.7 percent and 3.8 percent respectively.

Changes in the nature of jobs and continually rising levels of education have combined to lift employers' educational requirements and preferences. Many older workers now have insufficient education to qualify for the types of jobs which have been growing most rapidly: medical and dental technicians, nurses,

therapists, technical aides in the sciences and engineering, mechanics and repairmen for complex equipment and machinery. Even for many plant production jobs in the major industries, employers for a variety of reasons seek young workers with high school educations or equivalent vocational training.

When older workers are displaced from their accustomed work, they must compete with younger, better educated workers. According to the most recent report on educational attainment of workers, that of the Bureau of Labor Statistics for March 1964, three-fifths of those who are 55 years and over have less than a high school education; more than one in five has less than 8 years of schooling. (See chart 3.)

The schooling of about one in ten white and one in five nonwhite unemployed workers 45 years or over is below the literacy level, represented by five years of schooling, a demarcation point used generally among educators. These older workers usually do not even qualify to enter training programs designed to develop new skills or refurbish outmoded ones, under the Manpower Development and Training Act.

That educational handicap is a barrier to employment is confirmed further by Bureau of Labor Statistics studies in 1962 and 1963 of displaced workers in five different industries: petroleum refining, foundries, and manufacturing of automobile equipment, glass jars, and floor coverings. The older displaced workers who completed high school had substantially less unemployment than those who did not. Displaced workers who were not seeking employment were primarily the less educated group who gave up hope in view of their combined handicap of age and inadequate education. W. H. Franke and the late R. C. Wilcock of the University of Illinois, in their studies in six midwestern cities in 1960-62, reported similar findings.

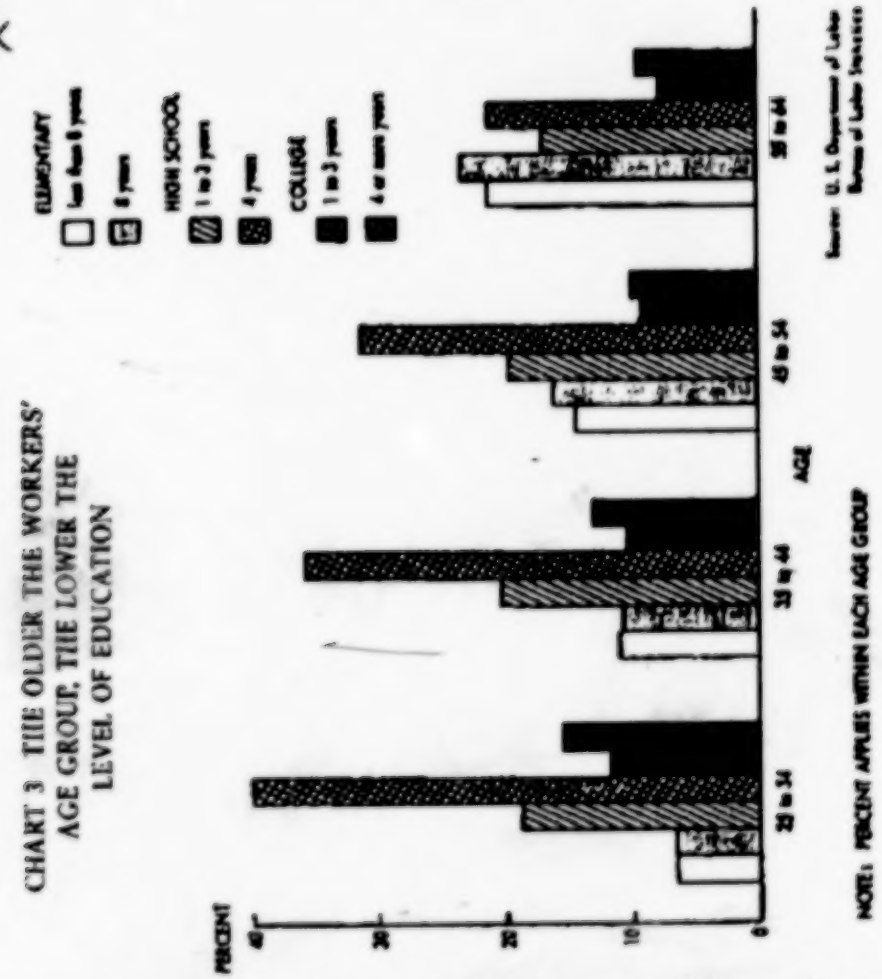
These studies are cited in the research materials which accompany this report.

Many older workers find it strange and difficult to go back to school as they recall it after many years of work and life. The experience of the Employment Service in serving these older people indicates quite clearly that special efforts are needed to help them over the hurdle of going back to some form of schooling – even at an adult level – and special programs under the Manpower Development and Training Act are being designed for this purpose (with the aid of the National Council on Aging). It has also become clear as a result of efforts under the

Manpower Development and Training Act that training must be custom tailored and must be accompanied by special job placement and job development assistance. The Manpower Development and Training Act program (preceded by the training program under the Area Redevelopment Act for depressed areas) is the first national education and training program directed specifically at the training and educational needs of the unemployed throughout the country. While there is now some means of assisting those who are unemployed, there is, as yet, virtually no means of assisting the employed whose education or training is deficient or outmoded – persons as it were, who are not in trouble, but who are heading for it. The Nation's adult education programs do not reach the great bulk of older people either while they are employed or afterward. Neither offerings nor educational methods are oriented toward the particular needs and interest of older workers in the population.

3. *Technological change itself affects the older worker's employability, not so much as a factor bearing on individual capacity, but as a significant influence on the environment in which the worker has aged.*

CHART 3 THE OLDER THE WORKERS' AGE GROUP, THE LOWER THE LEVEL OF EDUCATION



The jobs under new technology are different from those for which the older worker was trained and in which he worked and acquired his experience. Often new jobs are in geographic locations to which younger more mobile workers are attracted; conversely, many older workers are entrenched in areas from which jobs have disappeared.

As new technology displaces older industries and plants and job methods, older workers are especially vulnerable to the changes which follow. Study after study over the last decade has pointed to the same conclusions:

those made by Wilcock and Franke, already cited; those made by the Bureau of Labor Statistics; and the experience of the U.S. Employment Service in projects to help displaced workers in cases of plant shutdowns, including the current project in South Bend, Indiana.

Older workers are often in jobs and plants newly established a generation or two ago. Their skills and experience are not always transferable, and the plants and industries which are new today are often geographically distant from the old. As new fuels have supplanted coal, for example, and as coal mining technology itself has improved, older miners have been stranded far from new centers of opportunity. Many of the older consumer goods manufacturing industries have shifted away from the long established centers of population, in response to new markets and new technology. Older workers displaced as a result of these shifts have often been stranded in the areas of decline. It is the younger workers, less encumbered with family, home, and community associations, who have followed the course of the Nation's industrial advance.

This is true of older workers not only in declining or depressed areas but generally of displaced older workers anywhere when technology changes the character of their jobs or their geographic location. A Bureau of Labor Statistics study of displaced workers from an automotive equipment plant, described in the research materials that accompany this report, illustrates the seriousness of this problem even when transfers to the new locations are offered with full retention of benefits. In this case only one-third of the workers accepted offers of transfer. Many who owned homes had to commute long distances daily to their new work location. Two out of five of those who did not accept transfer were still unemployed 10 months after their layoff.

These changes in technology and in the location of industry have also left older industries with higher than usual concentrations of older workers. In turn, this concentration has given rise to special programs for compulsory or early retirement in "declining" industries – and even in stable or growing industries during periods of economic downturn – designed to open opportunities for younger workers. Moreover, the very availability of Social Security benefits, although yielding only a minimum income (which has to be supplemented from other sources) to workers in retirement, has made it possible to rationalize involuntary retirements induced for reasons of company manpower or personnel policy.

Further, the development of "special early retirement" incentive programs under private pension plans has opened up additional opportunities for even earlier separation of new groups of older workers. While special benefits are generally offered to induce retirement prior to the normal retirement age, the practice tends to push downward the ages at which employers are willing to employ older workers for new jobs or vacancies.

The pace of technological change, and its effect on the growth and decline of industries, has meant not only changes in the jobs that men hold, but more job changes during their working lives. Workers in the closing decades of this century will have held many more jobs during their lifetimes than did their parents and grandparents. New plants staffed with young work forces may give way to new activity before their workers grow old; a young work force might then come to be regarded as a "normal" work force, and the hiring of older workers as "exceptional."

4. *There is no evidence that unusual numbers of individual older workers fail of selection because of valid advance judgments about expected productivity.*

Obviously individuals in all age groups fail to pass a variety of aptitude and other entrance tests. But there is no evidence that older workers' experiences are different from those of the population generally, except in one respect – the better showing of younger, better-educated workers on tests in which performance is affected by recency of education and testing experience.

Judging expected performance is a difficult task. Wide variations in performance exist among individuals of every age group. All of the studies of job performance of older workers have found this to be true in all of the types of work studied.

Studies made by the Bureau of Labor Statistics of job performance of workers in factory production jobs, in office work, and in mail sorting jobs, for example, show that average performance of older workers compares most favorably in office jobs, where productivity equaled that of younger groups and steadiness of output from week to week rose with age, and compares least favorably in production jobs, where average production declined slightly after age 45, somewhat more markedly after age 55, and substantially after age 65. Among the mail sorters, there was no significant production decline until age 65. Studies by the Canadian Department of Labor of retail sales personnel show that peak performance was reached in the fifties (51-55 in one case and 56-60 in the other).

The Bureau of Labor Statistics studies of production workers also show that individual variation from the average in every age group is substantial, indicating that in each of the groups many workers will be found whose performance may be considerably below the average, as well as above average. Over two-fifths of the men 45-54 years of age, and over 30 percent of the men 55-64 years of age in footwear plants had an output per man-hour greater than the average for the age group

35-44. Conversely, of course, 57 percent of those 45-54 and 68 percent of those age 55-64 had an output equal to or lower than the average for the group age 35-44.

These findings show the injustice of judging workers by the average for the group rather than on the basis of their individual abilities. They also show the futility of using past average performance of an overall group to judge superiority and inferiority of a particular applicant for work.

D. Institutional Arrangements that Indirectly Restrict the Employment of Older Workers

A broad range of personnel programs and practices affect the employment of the older worker, although they were not developed for this purpose. Instituted to bring efficiency, equity, order, and improved fringe benefits, they operate with some force against older workers not within their compass.

1. *The efficient operation of modern business requires specialized personnel administration and established personnel rules.*

This often means rather general rules, and the application of general rules – often a "book of rules" – to individual cases. This is as true of hiring policies respecting age as it is of other matters of personnel policy.

The 1965 Employment Service survey found that hiring policies were preponderantly set by central managements, including personnel officials. Yet in only one case in six was a positive nondiscriminatory policy reported with respect to age. The practice of generalizing personnel hiring policy by arbitrary rules which ignore individual differences is itself a factor that deprives companies of talent and qualified workers of opportunity.

2. *Personnel policies are properly designed to establish an orderly system for assignment and promotion of already employed workers.*

Promotion-from-within policies, accepted as desirable by management and worker alike, very often restrict hiring from outside the firm to lower wage entry levels, traditionally regarded as more suitable for younger workers. Staffing to assure the "age balance" of the work force, or continuity of operation by advance designation of successors, also restricts outside recruitment to lowlevel jobs and younger workers.

Starting the older worker at a low-level job involves not only age balance, but questions of pay. For the experienced worker an entry job often means a reduction in earnings level. Resistance to such cuts in earnings has been found to limit reemployment opportunities in several case studies of displaced workers. Some refusals to hire older workers were explained on this basis by employers cooperating in the 1965 Employment Service study; in other cases employers were reluctant to offer jobs at pay levels they regarded as appropriate for younger workers. Employers also expressed the view that younger workers could in general be employed at lesser rates of pay.

The question of earnings also arises in the administration of unemployment insurance; workers, particularly those experiencing long periods of unemployment, are counseled to be realistic about earnings horizons, and failure to adjust to realistic levels is often cause for disqualification under State statutes. Under the program of Federal extended unemployment benefits proposed by the president and contained in H.R. 8282 and S. 1991, greater emphasis is to be placed on such counseling of unemployed workers.

3. *Seniority systems which generally protect older workers in their jobs – because of longer service, not age as such – sometimes operate to impede the employment of other older workers with long industrial*

service but without recall rights in particular seniority units.

Where seniority units for layoff purposes are narrow they may result in layoffs of workers who have longer service than workers in other seniority units who are retained. And while older workers are being laid off in one seniority unit, new workers may – under some collective bargaining agreements – be hired in another.

4. *Employer attitudes toward the hiring of older workers are affected by fear of rising costs under recent court decisions interpreting State workmen's compensation laws.*

As a result of court awards for disabilities stemming from pre-existing conditions such as arthritis, heart malfunction, diabetes, and other degenerative diseases that employers had contended were not job related, some employers are becoming reluctant to employ older workers (as well as handicapped workers). Further information on these developments is contained in the research materials which accompany this report.

Neither the operation of the workmen's compensation laws nor of the unemployment insurance systems can be expected to lessen employer concern over such costs. What is involved is a major gap in coverage for disabilities that are not job related – a gap which itself erects a barrier to the employment of the older worker.

5. *The private pension, health, and insurance plans which have improved the situation of employed workers are probably affecting adversely the hiring of unemployed older workers.*

It is not clear to what extent these restraints arise directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs. A recent Bureau of Labor Statistics analysis of the costs of these plans, and extensive actuarial calculations covering

pension costs, are summarized in the research materials which accompany this report.

Private pension plans now cover more than a third of the nonfarm work force and health and insurance arrangements cover three out of four. There are many types of plans, ranging from pension and health and insurance packages purchased by companies willing to spend specific amounts of money to elaborate self-insured arrangements.

The variety of these plans is paralleled by variations in their costs. Under one important group of pension plans, for example, average annual costs, if calculated separately by age groups, is about $80 a year higher for workers hired in their late forties than for workers hired in their late-twenties. This does not necessarily mean, however, that overall costs increase when firms follow policies of hiring older workers. Where vesting of employee pension credits is provided, the differential costs are smaller. Moreover, where benefit formulas are based largely on highest earnings or earnings during the last few years of service, the ultimate pension costs could be greater for newly hired young employees than for older ones.

Since life insurance plans are group plans, the most important cost factors are the average age and experience of the group. If turnover keeps average age relatively constant, employers are free to hire older workers without added cost.

When insurance costs are calculated by age groups, they are as a whole related to age. The BLS study estimates that for large employers, net insurance premiums after dividends for a $5,000 life insurance policy are almost $3 per month higher for workers 45 to 54 years old than for those under 45, and $8 per month more for workers 55 to 64.

Age is a far less important factor in health care; differential costs basically depend upon marital status and family coverage rather than age. Costs for married workers and their families are about the same for all ages up to nearly 65. For large plans, the net cost for single men – who are less than a third of all nonfarm male employees – although much lower than for married men with families, show differentials of about $3 per month for men 45 to 54, and $5 per month for men 55 to 64, over costs for workers under 45. Accident and sickness plans show similar cost differentials.

The overall cost of a health and insurance program will be affected by experience rating (although this does not apply in a large number of cases), by funding methods, and by hiring policies which affect experience. The cost of a typical health and insurance package for a company with a hiring policy that concentrates on young workers may prove to be less than that for a company with balanced hiring in all age brackets.

Cost considerations do not, however, always operate against the older worker. Where benefit formulas yield smaller pensions for newly hired older workers the costs are not greatly affected; where central funds are established, as in multiemployer plans, an individual employer's contribution is not ordinarily affected. Similarly, the purchase of group insurance is often handled without regard to changes in the age distribution of the work force, and medical insurance is often purchased from community organizations at communitywide rates. In some cases, special plans have been developed which are neutral with respect to the relationship of cost to age. Older workers are widely hired by employers with pension and insurance plans as well as by those without such plans.

Relatively few employers, in fact, cited the costs of providing pension and insurance benefits as significant

barriers to employment of older persons when interviewed during the course of the 1965 Employment Service study of employer hiring practices and policies. Even in cases where they mentioned pension and insurance, cost was not the principal factor involved. Rather, what was cited was the company policy of excluding new employees beyond a certain age from coverage under pension plans – exclusions generally developed because of the time required to build up minimum credits – and in the case of insurance presumed inability to pass physical examinations.

The age exclusions under pension plans vary widely from under age 50 to over age 65; more than a third of them are set at or below age 55. (See chart 4.)

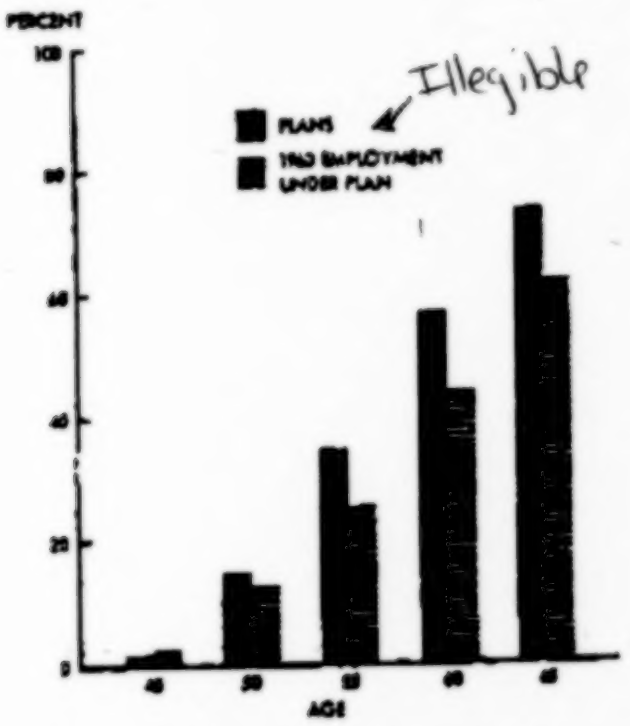
They undoubtedly have an effect upon hiring age limits. Employers in some cases are averse to hiring workers excluded from major fringe benefits. In other situations they are reluctant to provide a reduced and less costly level of fringe benefits. In still other cases they may be reluctance [sic] to provide regular pension benefits if special additional costs would be in involved.

Hiring age exclusions are often lower than pension plan age limits. The lower the established retirement age, the lower the hiring age is likely to be, to allow sufficient time for acquiring pension eligibility and earning an adequate pension. While 65 has been the usual age for normal retirement in most private pension plans as well as in OASDI, there has been some lowering of this age in recent years. In addition, recently negotiated "special early retirement" clauses, which provide higher benefits than "normal" as incentives toward earlier retirement, can accelerate this trend toward earlier retirement, lower further the actual age of retirement, and exert more pressure on maximum hiring ages. In some cases these provisions bar the reentry of workers into certain types of activity, either in the same craft or industry.

The spread of compulsory and automatic retirement provisions has also lowered the age of retirement for many who want to continue to work beyond age 65. About one-third of men retired under OASDI regard their retirement as involuntary, as do about 10 percent of those retired under early retirement plans in recent years, according to Department of Health, Education, and Welfare and Cornell University surveys.

Provisions which enable workers to carry earned pension credits with them to new employment could aid the reemployment of older workers.

CHART 4. A THIRD OF PRIVATE PENSION PLANS EXCLUDED WORKERS HIRED AT AGE 55 AND OVER HALF AT AGE 60.



Source U.S. Department of Labor, Bureau of Labor Statistics

Vesting provisions are found in about 2 out of 3 plans covering 3 out of 5 workers under private pension plans, according to a recent analysis by the Bureau of Labor Statistics. If vested rights from previous employment were added to the pension credits the older worker would earn in his new employment, his pension could be considerably higher than could otherwise be provided without added cost. This or other arrangements to facilitate portability of credits could reduce present employer reluctance to hire older workers.

Vesting would also narrow the present cost advantage that favors younger workers, and which arises partly because younger workers, without vesting and with greater turnover, often forfeit their pension rights.

The extent to which the range of pension plan-induced limitations on employment can be considered to constitute arbitrary discrimination is not a simple matter, particularly in the light of the great variations in plan provisions and employer practice. Case-by-case examination is necessary to separate reasonable from unreasonable practice.

The Consequences of Such Discrimination on the Economy and Individuals Affected

The consequences of discrimination embrace a wide range of production loss, human hardship, and frustrations. This may well include the loss of important innovations in the fields of science and technology. Since our society has by no means yet worked out the role to be played by older workers in their later productive years of life, what remains here is an unmeasured as well as untapped resource.

A. The Consequences to the Economy

It is a fair estimate that a million man-years of productive time are unused each year because of unemployment of workers over 45; and vastly greater

numbers of years are lost because of forced, compulsory, or automatic retirement.

The total costs to the Nation's economy of the combination of factors which underlie discrimination on account of age cannot easily be calculated. Even where the loss is tangible it is possible to make only very rough approximations; moreover, it is difficult to differentiate the effects of discrimination from other influences.

A substantial portion of the unemployment insurance payments of $1 billion a year to workers 45 and over can be attributed to unemployment resulting in one way or another from the fact of the employee's age. Some of these payments, of course, would go to workers who are between jobs even under conditions of full employment; nonetheless, a large but incalculable proportion involves long- duration unemployment that reflects the difficulty which the older worker faces in attempting to find a new job. The Nation loses, furthermore, potential production in an amount at least two or three times the size of the unemployment insurance payments that might be attributable to discrimination.

It is impossible to estimate what proportion of these costs of unemployment insurance and lost production results form "arbitrary" discrimination, of the kind which might be dealt with by a statute prohibiting discrimination in employment on the basis of age.

Only a hypothetical calculation can be made of the potential contributions of those who have retired involuntarily. Such a calculation would easily yield several billion dollars a year on the assumption that the participation rate for males 65 and over (in either paid or voluntary activity) might rise to a point about halfway between the present labor force participation rate (28 percent) and the 1948 rate of 47 percent (less than half the participation rate for lower ages), and that earnings

would not on the average exceed the amounts possible without reduction of OASDI benefits. The fact that about one-third of the men retiring under OASDI regarded their retirement as involuntary – as previously indicated – suggests that these assumptions may not be unreasonable. Moreover, the results of this calculation are similar to those of the late Professor Sumner Slichter who in 1952 estimated $3.8 billion in 1951 prices as a conservative measure of "present loss of production from retired workers."

B. The Consequences to the Individual

The position of the individual older worker, relative to the position of workers in the prime age groups, reflects not only relative disadvantage, but deterioration as well.

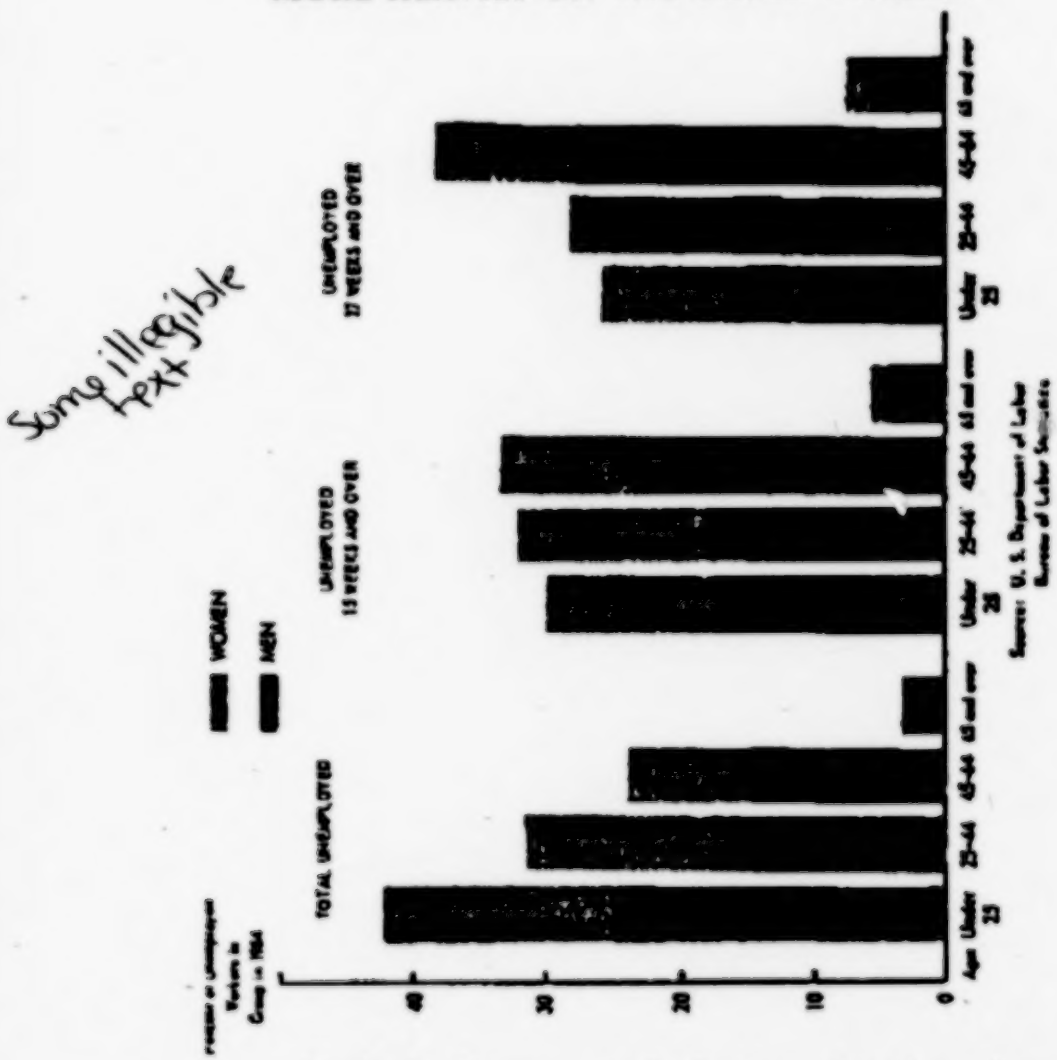
The unemployment rate of male workers 45 and over last year was one-fifth greater than the rate in the 35-44 year group.

Older workers (45 and over) experienced more long-term unemployment than younger groups. (See chart 5.) On the average this unemployment lasted 8 weeks longer – about 75 percent longer – than the average duration of unemployment for workers under 45.

The proportion of the very long-term unemployed (over 27 weeks) made up of men 45 and over has been rising in the face of a generally improved employment situation: from 31.5 percent in 1961 to 33.6 percent in 1964 and has begun to improve only in recent months – a lagging improvement of the kind that has in the past generally characterized the unemployment situation of older workers after each period of downturn or inadequate growth.

This development is often accompanied by another kind of deterioration that cannot be measured – deterioration of skill and motivation, with consequent reduced acceptability to employers.

CHART 5. LONG-TERM UNEMPLOYMENT FALLS MORE HEAVILY ON THE OLDER WORKER



Limited literacy and basic education have inhibited the retraining of older workers under the Manpower Development and Training Act. They are in fact badly underrepresented in such training. While workers 45 and over constitute 27 percent of the unemployed, they represent only 11 percent of MDTA trainees. This situation can be remedied to some extent under the literacy amendments to the act. But it will also

be necessary to overcome the present administrative inhibitions which arise in part from the MDTA requirement concerning prospective employment opportunity.

The consequences of discrimination on the individuals affected go far beyond those attributable to arbitrary refusal to employ on the basis of age.

They show up in widespread uncertainty concerning the role of rigorous older persons in our society, and in personal frustrations and anxieties. While the opportunity to retire with some income has meant leisure and escape from routine for a great many, it has also created new uncertainties, particularly where *opportunity* to retire has been converted into *forced* retirement, and where there is no new opportunity for satisfying occupation.

While the economic situation of retired workers has steadily improved with the increases in retirement benefits, it is still of great concern that almost one-seventh of the Nation's poverty problem involves low-income persons over 65. The vast majority of older persons have virtually no financial assets to supplement their pensions. Many are barely outside the poverty border: over 40 percent of married couples with one member over 65 had incomes in 1962 of less than the $2500 required to meet the budget estimated by the Bureau of Labor Statistics as being "modest but adequate" for a retired elderly couple.

III. Conclusions and Recommendations

It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

The firmest conclusion from this year long study is that the most serious barriers to the employment of older workers are erected on just enough basis of fact to make

it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as "arbitrary" and to concentrate on the prohibition of practices which include this element.

A larger, more informed effort is required.

To the extent that arbitrary discrimination occurs, it can and should be stopped.

To the extent that obstacles exist to the employment of older workers because of limitations in their abilities, these abilities must be enlarged.

To the extent that the process of matching men and jobs is working to the disadvantage of older workers, the process must be improved.

To the extent that employment security and income maintenance programs are having a wholly unintended adverse effect on the position of older workers who are unemployed, these programs must be adjusted.

All these things are possible, given a national will and a national effort.

Such an effort will include four types of programs.

First: *Action* to eliminate arbitrary age discrimination in employment.

Second: *Action* to adjust institutional arrangements which work to the disadvantage of older workers.

Third: *Action* to increase the availability of work for older workers.

Fourth: *Action* to enlarge educational concepts and institutions to meet the needs and opportunities of older age.

These recommendations are made pursuant to a Congressional directive that a study be carried out and that the Secretary of Labor report the results of such study and "include in such report such recommendations

for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." These recommendations derive only from the directive and the study. They do not constitute proposals by the Administration. Their ultimate consideration will necessarily be as part of a broader balancing with other important measures involving other needs.

Action to Eliminate Arbitrary Age Discrimination in Employment

There is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability. The use of these age limits continues despite years of effort to reduce this type of discrimination through studies, information and general education undertaken by the Federal Government and many States, as well as by nonprofit and employer and labor organizations.

The possibility of new *nonstatutory* means of dealing with such arbitrary discrimination has been explored. That area is barren.

State experience with statutes prohibiting discrimination in employment on the basis of age indicates that such practice can be reduced by a well-administered and well-enforced statute, coupled with an educational program. It is clear from this experience that an educational program to promote hiring on the basis of individual merit is far more effective when provided for by statute.

The elimination of arbitrary age limits on employment will proceed much more rapidly if the Federal Government declares, clearly and unequivocally, and implements so far as is practicable, a national policy with respect to hiring on the basis of ability rather than age.

Such implementation should emphasize the role to be played by persuasion and education, both in general and in individual cases of alleged violations of policy, and should provide for action in the event that persuasion and education fail.

Specific provision should be made for handling instances of *alleged* arbitrary discrimination where the facts of the case indicate that the older worker in question needs reeducation, training, counseling, or health and other services. In these cases the individual should be referred to the appropriate programs for needed assistance.

While State laws have been increasing in number, some are not implemented at all, and, with few exceptions, the State resources have been inadequate for assuring effective compliance. Activities on behalf of older workers have had a tendency to become submerged in broader programs to prevent discrimination on account of race, color, or religion.

A clear-cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age.

Action to Adjust Institutional Arrangements Which Work to the Disadvantage of Older Workers

To eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring.

This will require special arrangements to overcome employer reluctance to hire qualified workers under present pension and seniority arrangements. It will be necessary to modify some existing arrangements, to encourage new kinds of employer and union actions, and

to explore additional steps to be taken by the Federal Government.

1. The report of the President's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, issued in January 1965, includes a wide range of recommendations for public policy regarding private pension plans. One important recommendation aimed at wider adoption of vesting provisions in private plans would improve employment opportunities for older workers. Another recommendation which would have long range beneficial effects in this regard called for a study of the feasibility of a system of portable pension credits. These proposals should be given prompt and full consideration.

2. New forms of private annuity coverage for older workers not covered by present private pension arrangements should be encouraged, and consideration given to the status of such annuities under the tax laws. Such arrangements could provide annuity coverage in cases where costs inhibit the hiring of older workers, without requiring the modification of the existing pension plan.

3. A comprehensive formal review of the gaps and inadequacies of present systems of workmen's compensation and disability insurance should be undertaken.

4. Methods should be developed for assisting private parties in collective bargaining to work out procedures which would open opportunities for hiring unemployed workers with long industrial service, while protecting the seniority rights of workers who are already employed.

Action to Increase the Availability of Work for Older Workers

The fundamental fact that will determine the situation of the unemployed older worker is the condition of the national economy. So long as there exists a considerable body of unemployed persons, the unemployed older worker will be competing for jobs at a disadvantage. By and large, the hard present facts of education, training, and mobility work to the advantage of younger workers. Full employment comes first in any serious intention to eliminate the disadvantages which unemployed older workers must overcome.

Given a high and expending level of employment, however, a vigorous nationwide employment effort, with new and improved arrangements directed at the needs of older workers, is required to provide the special counseling, training, and placement attention that will lead to job opportunities.

The United States Employment Service and the affiliated State services constitute the basic operating resources for getting this job done. Where concentrated efforts have been made in behalf of older workers, the experience of the Employment Service clearly shows that substantial employment opportunities can be developed. But a fully adequate program will require

-- additional intensive individual counseling and group counseling with specially trained counselors available for older workers, including veterans (many of whom are now in their forties and fifties) and military retirees;

-- the organization of new job-finding community activities, including self- help groups;

-- the development of *part-time* employment opportunities;

-- referral to appropriate retraining projects and basic education courses, or to other facilities and

services such as those provided in the field of vocational rehabilitation or to be provided under the pending Older Americans Act;

-- the organization of community efforts to change employers' attitudes toward rigid age restrictions;

-- intensification of programs for dealing with mass layoffs from plant shutdown, whether related to changes in defense programs or in civilian production.

It will also require, under the Manpower Development and Training Act.

-- larger provision for training and retraining opportunities for older workers, especially through on-the-job training;

-- development of new and more effective methods of training adult workers;

-- more opportunities for basic education and income supplements to make this education practicable.

To achieve all this will call not only for action in new directions but for special leadership and attention to the problems of the older worker at a key point in the administration of the Nation's manpower programs. This should be a matter given special attention in developing the nationwide employment effort.

Labor and management must be relied on to work out techniques to help older workers meet the requirements of new jobs while they are still employed, and thus forestall the likelihood of unemployment. Several specific possibilities were emphasized in the 1962 Automation Report of the President's Advisory Committee on Labor-Management Policy:

-- planning job changes in advance;

-- cooperation between management and employee representatives to meet the problems involved;

-- open reporting to the employees involved;

-- timing of changes to take advantage of expansion and attrition;

-- institution of severance pay programs based on length of service.

Techniques for the advance planning of manpower requirements are being applied in a number of industries, and have been used successfully in several difficult disputes over adjustment to technological change.

Techniques are only beginning to be developed for the redesign of jobs to permit greater numbers of older workers to function effectively and at high levels of productivity.

Techniques are being developed for effective pre-retirement planning which can mean the difference between good and poor adjustment. They encompass financial planning, living arrangements, the managing of money, health problems, and the question of what to do with one's time. They are best carried out at the work location and where possible under joint labor-management sponsorship.

There are many community tasks on which older persons can be employed. There are substantial community needs that have not been met, and for which local authorities do not have funds. A great deal of this work can be done by older workers, and would be if Federal assistance were available in a form similar to the present financing of the Neighborhood Youth Corps. Community work would recapture and preserve human abilities, utilize manpower, provide satisfying occupation, and forestall additions to the mounting welfare case load.

Local communities should be encouraged and assisted to develop employment opportunities in cooperation with private enterprise as well as through public and non-profit agencies. Participation by private enterprise in the administration of parts of the War on Poverty, in connection with the Job Corps camps and work experience projects, and in the on-the-job training programs under the MDTA and President Johnson's Job Development Program, open new horizons for ingenuity and innovation. There are, and are likely to continue to be, however, tens of thousands of workers with inadequate sources of income and no employment prospects, who are over 55, have exhausted unemployment compensation, and are not yet eligible for retirement benefits. It is not right or reasonable that those whom the economy has displaced at ages between 55 and 65 in the course of technical progress, and whom it will not take back into productive employment, should suffer because of the unavailability of work opportunity. A special program to meet the income needs of this limited group should be considered not only on its own merits but to reduce the growing pressure for a costly early retirement system.

Action To Enlarge Educational Concepts and Institutions To Meet the Needs and Opportunities of Older Age

There is a still broader dimension to all this.

The difficulties of being an older worker are only part of the difficulties of being an older person. There has been too narrow an emphasis on "work," too little recognition of the broader concept of "function" – and the difference gets clearer when an individual's time for work is running out but his capacity, and need, to function continue: Part of age discrimination in employment and part of the answer to it involve this relationship between work and function: for it is wrong to

think so much in terms of a person's right or desire to keep on indefinitely at the kind of thing he has always done.

Yet as things now stand, most people's education and their experience are directed largely at what they do during their "lifetime's work" and not at all at what they will do when that work tapers off but a lot of life remains to be lived.

What this study has made clear and this report must convey is the working of two powerful, related, but in a sense opposing processes: men and women are living longer lives than before; but during their lives the world – of ideas, of institutions, of work and function – is changing more rapidly than ever before.

Through most of history, life has been a process of a steadily increasing maturity and growing understanding of the world in which one lives. Suddenly, as life grows longer, the sum total of human knowledge is compounded faster, the pace of technological progress accelerates – and the process of getting older presents the prospect that as an individual ages he or she will become less, rather than more, familiar with the essential facts of life.

In certain profound ways, people today *diminish* during their lives, in understanding. Today's adult finds the grade school mathematics of his children difficult if not impossible to grasp. H. G. Wells described civilization as a race between education and catastrophe. Acknowledging that to fall hopelessly behind events in middle age is indeed a catastrophe, means facing the further fact that more and more persons are losing that race.

If this appears removed from the issue of age discrimination in employment it is necessary to say plainly that most of those who suffer the worst employment disadvantage with their advancing years are

those with the least preparation for the changing demands of those years.

The point has now been reached where almost every boy and girl from age 6 to 16 is in school and a great majority of them finish high school. A much smaller number, about one in four, go on to college, and the evidence is clear that those who do are on the whole well equipped to keep abreast of developments as they go through life. Their education never really stops, or they are at all events able to resume it when necessity or interest indicates that they should do so.

But what about the others, those who leave off their education at high school, or before. The time when a person could, before he was sixteen or eighteen, acquire a set of skills, or ideas, and make do with them for life, is gone. If anything is certain, it is that most of the members of this group, particularly the wage earners, will sooner or later urgently need further education and training. It is almost an iron law of the coming age, or indeed the present age. Yet there are at present only the most limited arrangements available to provide that education and training. The direct needs of American wage earners, and the larger interests of American society, require that bold thought be directed to means by which we can enable persons who did not attend college in their youth to resume their education on meaningful and productive terms later in their life.

A new system of continuing educational opportunity should be developed for achieving better preparation of our older workers for economic and job changes, to make them less vulnerable to displacement, to protect them against discrimination, and to open the way to more satisfying activity in retirement.

-- These opportunities should make it possible for individual workers to receive modern educations which will make up for earlier failure

to complete grade school or high school, and should open opportunity for educational and technical refurbishment.

-- They should include appropriate financial assistance for limited but adequate periods of time. It will be important to explore a variety of methods by which new types of adult education can be woven into work life.

-- The financing of these new opportunities should be a matter of thorough study. Consideration might be given, for instance, to the possibilities of a new system of contributory insurance for educational credits for workers.

A program along these lines, in addition to providing an entirely new horizon of opportunity to those in the work force who are over 45, can also open new job opportunities for others while older workers are on "educational sabbaticals." It can lead to the innovations and economic growth that new combinations of experience and modern education can provide, can furnish a basis for a new type of economic activity, and can be a constructive form of distributing reduced hours of active work in our society. A 1-year educational sabbatical, for example, is roughly the equivalent of a 1-hour reduction in weekly hours over a working life. A 3-month educational sabbatical is equivalent in time to an added coffee break each week of working life.

The basic reply then to the Congress' inquiry about what is required to prevent age discrimination in employment is that there should be provided the opportunity for full *participating* membership in the society until death – and that continuing education is the necessary and only possible qualification for such participation.

All this is not the work of one legislative program, nor of one legislative session, but the time is at hand to

go ahead. "Knowledge comes," Tennyson wrote, "but wisdom lingers." We possess the knowledge in general terms of what must be done. This report is offered in the sincere hope that it will help muster the wisdom to proceed.

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(8)

No. 03-1160

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Azel P. Smith, *et al.*,

Petitioners,

v.

City of Jackson, Mississippi, and
Police Department of the City of Jackson, Mississippi,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Are disparate impact claims cognizable under the Age Discrimination in Employment Act?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Willie Allen; Joe L. Austin; Jerry Brister; Gloria Burns; Jacqueline Butler; Harvey L. Davis; William H. Gladney, Sr.; Tommie L. Grant; Ned Garner; William R. Gardner; Samuel Haymer; James J. Howard; Warren E. Hull; Thomas Hunter; Arlander Luallen, Jr.; Willie Mack; Eugene McDonald; Carey N. Parkinson; Ruthie Porter; Cleotha Ratliff; John M. Russell; David L. Shaw; Wayne Simpson, Jr.; Richard J. Smith; Kenneth W. Stemmons; James B. Strawbridge; Alphonso Taylor; Miller Weston; and Shirley Williams.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
BRIEF OF THE PETITIONERS 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY AND REGULATORY PROVISIONS 1
STATEMENT 2
SUMMARY OF ARGUMENT 7
ARGUMENT 10
I. The EEOC's Recognition Of Disparate Impact Claims Represents The Better Construction Of The ADEA 11
A. The EEOC's Interpretation Is Faithful To This Court's Decision In *Griggs* v. *Duke Power Co.*, Which Construed The Identical Language Of Title VII, On Which Congress Modeled The ADEA. 11
B. The Text Of The ADEA Supports The EEOC's Determination That Disparate Impact Claims May Be Brought Under The ADEA. 17
1. The ADEA's "Reasonable Factors Other Than Age" Provision Reinforces The Conclusion That Disparate Impact Claims Are Cognizable 17
2. The Phrase "Because Of" In Subsection (a)(2) Does Not Preclude Disparate Impact Claims. 22
C. The Purpose Of The ADEA Confirms The EEOC's Conclusion That Disparate Impact Claims Are Cognizable. 25

II. The EEOC's Regulations Are Entitled To *Chevron* Deference. 29
CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Adams v. *Fla. Power Corp.*, 255 F.3d 1322 (CA11), cert. granted, 534 U.S. 1054 (2001), and cert. dismissed, 535 U.S. 228 (2002) 10, 20, 21, 37
Alaska Dep't of Envtl. Conservation v. *EPA*, 124 S. Ct. 983 (2004) 36
Aldrich v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520 (CA2 1992) 21
Aluminum Co. of Am. v. *Cent. Lincoln Peoples' Utility Dist.*, 467 U.S. 380 (1984) 34
Arnett v. *Cal. Pub. Employees Ret. Sys.*, 179 F.3d 690 (CA9 1999), vacated on other grounds and remanded by 528 U.S. 1111 (2000) 6
Astoria Fed. Sav. & Loan Ass'n v. *Solimino*, 501 U.S. 104 (1991) 15
Auer v. *Robbins*, 519 U.S. 452 (1997) 33
Barnhart v. *Thomas*, 124 S. Ct. 376 (2003) 3
Barnhart v. *Walton*, 535 U.S. 212 (2002) 3, 33
Boeing Co. v. *United States*, 537 U.S. 437 (2003) 35
Bryant v. *City of Chicago*, 200 F.3d 1092 (CA7 2000) 20
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ..... passim
Christensen v. *Harris County*, 529 U.S. 576 (2000) .. 7, 31, 32
Clackamas Gastroenterology Assocs., P.C. v. *Wells*, 538 U.S. 440 (2003) 30
Clarke v. *Sec. Indus. Ass'n*, 479 U.S. 388 (1987) 32
Connecticut v. *Teal*, 457 U.S. 440 (1982) 11, 12
County of Washington v. *Gunther*, 452 U.S. 161 (1981) 21
Cullen v. *Indiana Bd. of Trustees*, 338 F.3d 693 (CA7 2003) 21
Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 14, 29
Edelman v. *Lynchburg Coll.*, 535 U.S. 106 (2002) 32, 35

EEOC v. *ARAMCO*, 499 U.S. 244 (1991) 7, 15, 31
EEOC v. *Associated Dry Goods Corp.*, 449 U.S. 590 (1981) 35
EEOC v. *Commercial Office Products Co.*, 486 U.S. 107 (1988) 14
EEOC v. *Francis W. Parker Sch.*, 41 F.3d 1073 (CA7 1994), cert. denied, 515 U.S. 1142 (1995) 28
EEOC v. *J.C. Penney Co.*, 843 F.2d 249 (CA6 1988) 21
EEOC v. *Wyoming*, 460 U.S. 226 (1983) 27, 28
Ellis v. *United Airlines, Inc.*, 73 F.3d 999 (CA10 1996) 21
Fisher v. *Transco Services-Milwaukee, Inc.*, 979 F.2d 1239 (CA7 1992) 35
Frank v. *United Airlines, Inc.*, 216 F.3d 845 (CA9 2000), cert. denied, 532 U.S. 914 (2001) 6
Geller v. *Markham*, 635 F.2d 1027 (CA2 1980) 6
General Dynamics Land Systems, Inc. v. *Cline*, 124 S. Ct. 1236 (2004) 16, 27
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) ..... passim
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 16
Good Samaritan Hosp. v. *Shalala*, 508 U.S. 402 (1993) 34
Hazen Paper Co. v. *Biggins*, 507 U.S. 604 (1993) ..... passim
Hishon v. *King & Spaulding*, 467 U.S. 69 (1984) 15
Hohn v. *United States*, 524 U.S. 236 (1998) 22
Holmes v. *Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) 13
Ingersoll-Rand Co. v. *McClendon*, 498 U.S. 133 (1990) 15
Int'l B'hood of Teamsters v. *United States*, 431 U.S. 324 (1977) 27
Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., UAW v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) 15
Johnson v. *Combs*, 471 F.2d 84 (CA5 1972) 14
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 12

Kolstad v. *Am. Dental Ass'n*, 527 U.S. 526 (1999) 15
Kralman v. *Ill. Dep't of Veterans' Affairs*, 23 F.3d 150 (CA7 1994) 30
Laugesen v. *Anaconda Co.*, 510 F.2d 310 (CA6 1975) 35
Lewis v. *Aerospace Comty. Credit Union*, 114 F.3d 745 (CA8 1997), cert. denied, 523 U.S. 1062 (1998) 6
Lorillard v. *Pons*, 434 U.S. 575 (1978) ..... passim
Lowe v. *Commack Union Free Sch. Dist.*, 886 F.2d 1364 (CA2 1989) 35
McKennon v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) 13, 14, 25
Mullin v. *Raytheon Co.*, 164 F.3d 696 (CA1 1999) 21
NationsBank of N.C., N.A. v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) 32
Northcross v. *Board of Education*, 412 U.S. 427 (1973) 13
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 15
Oncale v. *Sundowner Offshore Servs.*, 523 U.S. 75 (1998) 27
Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 (1979). 13, 14, 25
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 22
Sanchez v. *Pacific Powder Co.*, 147 F.3d 1097 (CA9 1994) 30
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 36
Smith v. *City of Des Moines*, 99 F.3d 1466 (CA8 1996) 6
Smith v. *Xerox Corp.*, 196 F.3d 358 (CA2 1999) 6
Stevens v. *Department of the Treasury*, 500 U.S. 1 (1991) 16
Teamsters v. *United States*, 431 U.S. 324 (1977) 4
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 3, 13, 15
U.S. Dep't of Energy v. *Ohio*, 503 U.S. 607 (1992) 13
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 13

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 30
US Airways, Inc. v. *Barnett*, 535 U.S. 391 (2002) 10
Watson v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) 27, 29
Western Air Lines, Inc. v. *Criswell*, 472 U.S. 400 (1985) 14, 30, 34
Whitman v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) 13
Zuber v. *Allen*, 396 U.S. 168 (1969) 34

Statutes

28 U.S.C. 1254(1) 1
Equal Pay Act, 29 U.S.C. 206 ..... passim
29 U.S.C. 206(d)(1) 6, 18, 19
Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, codified as amended at 29 U.S.C. 621-34 ..... passim
29 U.S.C. 621(a)(2) 4, 25
29 U.S.C. 621(b) 27
29 U.S.C. 623 1
29 U.S.C. 623(a)(2) ..... passim
29 U.S.C. 623(f) 6
29 U.S.C. 623(f)(1) 9, 17, 19, 24
29 U.S.C. 628 ..... 5, 30, 31
29 U.S.C. 629(f)(1) 10
29 U.S.C. 631(a) 5
29 U.S.C. 633(b) 14
42 U.S.C. 1981a(b)(1) 23
Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 253, codified as amended at 42 U.S.C. 2000e to 2000e-17 ..... passim
42 U.S.C. 2000e-2(a)(2) 4, 11, 17
42 U.S.C. 2000-e2(k) 12
42 U.S.C. 2000-e2(k)(1)(A) 12

42 U.S.C. 2000e-12(a) 31
Civil Rights Act of 1991, § 3(3), 42 U.S.C. 1981 note 12

Other Authorities

Br. of EEOC, *EEOC* v. *McDonnell Douglas Co.*, 191 F.3d 948 (CA8 1999) 33
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Br. of EEOC, *Meacham* v. *Knolls Atomic Power Lab.* (CA2 No. 02-7474) 20, 33
Br. of EEOC, *Sitko* v. *Goodyear Tire & Rubber* (CA6 No. 02-4083) ..... passim
Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071 (1998) 34
Michael Evan Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 BERKELEY J. EMP. & LAB. L. 1 (2004) 21
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Jan W. Henkel, *The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages After* Hazen Paper Co. v. Biggins, 47 SYRACUSE L. REV. 1183 (1997) 28
H.R. 5110, 88th Cong. (1963) 21
Steven J. Kamenshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229 (1990) 28
THE NEW OXFORD AMERICAN DICTIONARY (2001) 24
Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (May 9, 1978) 5
S. Rep. No. 263, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509 35

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Regulatory Materials

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29 C.F.R. 806.103(f)(2) 34
29 C.F.R. 1625.7 2
29 C.F.R. 1625.7(d) 5, 8
33 Fed. Reg. 9172 (June 21, 1968) (codified at 29 C.F.R. 860.103 (1968)) 8, 10
34 Fed. Reg. 322 (Jan. 9, 1963) (codified at 29 C.F.R. 860.104)) 8
35 Fed. Reg. 12,333 (Aug. 1, 1970) 30
44 Fed. Reg. 37,974 (June 29, 1979) 30
44 Fed. Reg. 68,858 (Nov. 30, 1979) 30
46 Fed. Reg. 47,724 (Sept. 29, 1981) 8, 11
46 Fed. Reg. 50,766 (Oct. 14, 1981) 32
Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724 (Sept. 29, 1981) (codified as amended in 29 C.F.R. pt. 1625) 8

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-38a) is published at 351 F.3d 183. The district court's order granting summary judgment in favor of respondents (Pet. App. 39a-49a), dated September 6, 2002, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2003. The petition for a writ of certiorari was filed on February 10, 2004, and was granted March 29, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Age Discrimination in Employment Act ("ADEA") of 1967, as amended, provides in relevant part:

(a) It shall be unlawful for an employer—

* * * *

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age * * *.

* * * *

(f) It shall not be unlawful for an employer * * *—

(1) to take any action otherwise prohibited under subsection[] (a) * * * where the differentiation is based on reasonable factors other than age * * *.

29 U.S.C. 623.

The regulations adopted by the Equal Employment Opportunity Commission ("EEOC") to implement the ADEA provide in relevant part:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

29 C.F.R. 1625.7(d).

STATEMENT

The question presented by this case is whether disparate impact claims are ever cognizable under the Age Discrimination in Employment Act. In other words, must the plaintiff in every ADEA case prove that the employer has purposefully chosen to disadvantage older workers, or can the plaintiff prevail by showing that a facially neutral policy has the consequence of disproportionately disadvantaging older workers and lacks a reasonable business justification?

The answer to the question presented is that the ADEA allows disparate impact claims. That conclusion is compelled and confirmed by regulations promulgated by the Equal Employment Opportunity Commission pursuant to notice-and-comment rulemaking. Those regulations, and their predecessors, have uniformly recognized the availability of disparate impact liability under the ADEA for more than thirty-five years. The regulations reflect the agency's expert understanding of the statute, for Congress designated the EEOC as the agency responsible for implementing the ADEA and gave it the power to promulgate regulations with the force of law. The regulations adhere to prior decisions by this Court construing the *identical* text of Title VII of the Civil Rights Act of 1964 to recognize disparate impact claims, see *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and the settled understanding that "the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII,'" *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)). The EEOC's ADEA regulations accordingly constitute, at the least, a permissible reading of the statute and, as such, are entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).[1]

This case does not call on the Court to decide any issue beyond whether disparate impact claims are ever cognizable under the ADEA. See Pet. i. It presents no questions relating to the elements of a disparate impact claim, the defenses that might be available to employers, or the allocation of burdens of proof between the parties. The lower courts can and should address those issues in the first instance, consistent with Congress's intent that the statute be given a practical construction. More than three decades' experience with the ADEA, including the longstanding recognition of disparate impact claims by federal regulatory agencies and a substantial number of circuits, shows that a disparate impact standard is eminently workable.

The Fifth Circuit's decision, which holds that the ADEA categorically precludes disparate impact claims in all circumstances and regardless of the employer's inability to identify any business justification for practices that disadvantage the class of persons Congress determined to protect under the statute, should accordingly be reversed. The case should be remanded for the lower courts to consider in the first instance the application of a disparate impact standard to petitioners' particular challenge.

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[1] See also, *e.g.*, *Barnhart* v. *Thomas*, 124 S. Ct. 376, 380 (2003) ("[W]hen the statute 'is silent or ambiguous' [with respect to the issue at hand] we must defer to a reasonable construction by the agency charged with its implementation." (quoting *Chevron*, 467 U.S. at 843)); *Barnhart* v. *Walton*, 535 U.S. 212, 227 (2002) (Scalia, J., concurring in part and concurring in the judgment).

1. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court held that disparate impact claims are cognizable under Title VII. At issue in *Griggs* was section 703(a)(2) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(2), which makes it unlawful for an employer to "limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Griggs* held that this language did not require the plaintiffs to show that their employer used the high school diploma and standardized test requirements challenged in that case for the purpose of excluding black workers from more desirable jobs; rather, it was sufficient to demonstrate that the power company's policies had a significant disproportionate impact on African-American employees and lacked a requisite business justification. See, *e.g.*, *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 609 (1993) (citing *Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15 (1977)); *Griggs*, 401 U.S. at 431 (disparate impact claims look beyond "overt discrimination * * * [to] practices that are fair in form, but discriminatory in operation").

In the Age Discrimination in Employment Act, Congress found both that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice," and that "certain *otherwise desirable practices* may work to the disadvantage of older persons." 29 U.S.C. 621(a)(2) (emphasis added). Congress drew the substantive prohibitions of the ADEA directly from Title VII, which had been enacted three years earlier. Section 4(a)(2) of the ADEA, in relevant part, renders it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(2). Thus, the prohibitory language of the ADEA traces the language of Title VII to the letter, simply

substituting "age" for "race, color, religion, sex, or national origin."

Congress delegated to the EEOC (and the Secretary of Labor before it) the authority to "issue such rules and regulations as [it] may consider necessary or appropriate for carrying out [the ADEA]." 29 U.S.C. 628.[2] In 1981, the EEOC promulgated a regulation – carrying forward the regulatory precedent promulgated by the Secretary of Labor upon the ADEA's enactment – recognizing disparate impact claims under the ADEA. 29 C.F.R. 1625.7(d). The EEOC's regulation has remained in effect for the past twenty-three years.

2. Petitioners in this case are police officers and public safety officers employed by respondents, the City of Jackson, Mississippi and its police department. Petitioners are all at least forty years of age and therefore fall within the class protected by the ADEA. See 29 U.S.C. 631(a).

Petitioners allege that changes to the respondents' pay policy for police and police safety officers violate the ADEA. After announcing a plan to raise the pay of its police officers, the City of Jackson adopted a Performance Pay Plan on October 1, 1998, and revised it effective March 1, 1999 ("Pay Plan"). Petitioners allege that the Pay Plan had a disparate impact on the class of employees protected by the ADEA by providing them with proportionately smaller wage increases than were granted to employees under the age of forty. Officers younger than forty received raises that were four standard deviations higher than those received by officers ages forty and over, and the average wage increases under the plan varied by age, with older officers receiving smaller increases than did younger ones. (Petitioners' separate claim that the Pay Plan constituted unlawful disparate treatment was re-

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[2] The ADEA originally assigned this authority to the Secretary of Labor. In 1978, that responsibility was reassigned to the EEOC. See Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (May 9, 1978).

manded by the court of appeals, see Pet. App. 27a, and is not at issue here.)

3. The district court granted respondents' motion for summary judgment on the purely legal ground that the ADEA categorically "does not allow for claims of disparate impact." Pet. App. 47a-48a.

A divided panel of the Fifth Circuit affirmed on the same ground. It rejected the longstanding holdings of the Second, Eighth, and Ninth Circuits that disparate impact claims are cognizable, adopting instead the contrary view of the First, Seventh, Tenth, and Eleventh Circuits.[3] The Fifth Circuit majority acknowledged the similarities between Title VII and the ADEA, but it placed heavy emphasis on one difference in the statutory text: the ADEA contains language, not found in Title VII, that permits employers to differentiate among employees based upon "reasonable factors other than age." 29 U.S.C. 623(f)(1). The majority found this provision analogous to the Equal Pay Act's exception for differential treatment based on "any other factor other than sex," *id.* § 206(d)(1), which (according to the Fifth Circuit) precludes disparate impact claims. Pet. App. 16a-17a. The majority also read the ADEA's legislative history as indicating Congress's intent to prohibit only intentional discrimination based on age, a fact that the court believed precluded the disparate impact method of proving discrimination claims. *Id.* 18a-22a.

In a footnote, the majority acknowledged that the EEOC had issued what it characterized as "guidelines for the conduct of ADEA cases" that recognized disparate impact claims. Pet. App. 10a n.5. It concluded, however, that "[s]uch guidelines are not entitled to *Chevron* deference" in light of *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), which concerned in relevant part an opinion letter issued by the Department of Labor's Wage and Hour Division interpreting the Fair Labor Standards Act of 1938, and *EEOC* v. *ARAMCO*, 499 U.S. 244, 256-58 (1991), which concerned the EEOC's relatively informal guidance relating to the Civil Rights Act of 1964. Pet. App. 10a n.5. The majority further found the EEOC's regulation insufficiently persuasive to warrant deference. *Id.* 10a n.5.

[3] Compare Pet. App. 7a-8a with, *e.g.*, *Frank* v. *United Airlines, Inc.*, 216 F.3d 845, 856 (CA9 2000) (citing *Arnett* v. *Cal. Pub. Employees Ret. Sys.*, 179 F.3d 690, 696 (CA9 1999), vacated on other grounds and remanded by 528 U.S. 1111 (2000)), cert. denied, 532 U.S. 914 (2001); *Smith* v. *Xerox Corp.*, 196 F.3d 358, 367 (CA2 1999) (citing *Geller* v. *Markham*, 635 F.2d 1027, 1032 (CA2 1980)); *Lewis* v. *Aerospace Comty. Credit Union*, 114 F.3d 745, 750 (CA8 1997) (citing *Smith* v. *City of Des Moines*, 99 F.3d 1466, 1470 (CA8 1996)), cert. denied, 523 U.S. 1062 (1998).

Judge Stewart dissented. He would have held that disparate impact claims are cognizable under the ADEA. Pet. App. 28a-38a. He read the ADEA's "reasonable factors other than age" provision to codify a defense to disparate impact claims, just as Title VII has a defense for "business necessit[ies]." *Id.* 30a-31a. Judge Stewart criticized the majority's reliance on the Equal Pay Act for failing to account for the difference between the Equal Pay Act's use of the word "any" and the ADEA's more rigorous requirement that the other factors invoked by the employer be "reasonable." *Id.* 32a. Turning to the majority's assertion that the statute was intended to reach only purposeful discrimination, Judge Stewart reasoned that the ADEA, like Title VII, was intended to "rid[] from the workplace an environment of *concealed* discrimination" and that "a disparate impact theory may be a plaintiff's only tool in counteracting sophisticated discrimination." *Id.* 34a, 35a.

4. This Court subsequently granted certiorari. See 124 S. Ct. 1724 (2004).

SUMMARY OF ARGUMENT

A straightforward application of this Court's employment discrimination and administrative law precedents compels the conclusion that the ADEA permits disparate impact claims. This Court is not being asked to interpret the ADEA on a blank slate. Since the enactment of the ADEA in 1967, the

administrative agencies expressly charged by Congress with responsibility for promulgating regulations to carry out the provisions of the ADEA have consistently read the relevant Act to reach practices that have a disparate impact on older workers and that are not reasonably related to the job in question. The EEOC has so concluded for decades in regulations, as did the Secretary of Labor before it. See 29 C.F.R. 1625.7(d); Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981) (codified as amended at 29 C.F.R. pt. 1625); 33 Fed. Reg. 9172, 9173 (June 21, 1968) (codified at 29 C.F.R. 860.103 (1968)); 34 Fed. Reg. 322, 322-23 (Jan. 9, 1963) (codified at 29 C.F.R. 860.104)). Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the EEOC's interpretation is binding. Furthermore, Congress has repeatedly amended the ADEA without disturbing that consistent regulatory construction.

The administrative interpretation of the ADEA has the two principal hallmarks of agency action entitled to *Chevron* deference. First, Congress granted the agencies in question the statutory authority to promulgate regulations with the force of law. Second, the EEOC regulations that embody the disparate impact standard were promulgated pursuant to formal notice-and-comment rulemaking.

As for the merits of the consistent agency interpretation of the ADEA, the EEOC's regulations reflect an entirely reasonable construction of the statutory text. They adhere to this Court's holding in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that the *identical* language of Title VII authorizes disparate impact claims. Indeed, *Griggs*, in combination with a long line of this Court's precedents holding that the ADEA and Title VII must be interpreted *pari passu*, makes clear that the EEOC's interpretation is not only reasonable, but inescapably correct.

An independent examination of the text and purposes of the ADEA confirms that *Griggs*, and in turn the EEOC's

regulations, properly (or, at the very least, reasonably) construe the statute. The ADEA provides that "otherwise prohibited" conduct is lawful when based on "*reasonable* factors other than age." 29 U.S.C. 623(f)(1) (emphasis added). That language rests on an assumption that some behavior will violate the ADEA even though it is motivated by factors other than the desire to treat older workers differently. Under the court of appeals' reading of the statute, however, the ADEA's "reasonable factors other than age" provision is surplusage.

The phrase "because of" does not limit the ADEA only to disparate treatment claims, any more than it does the *identical* text of Title VII. Rather, that phrase simply signifies causation and, in the context of this statute, is not limited to purposeful discrimination. For example, a strength test for a sedentary job that older workers disproportionately fail would cause those workers to lose their employment "because of" their age. If that test does not bear a reasonable relationship to the job, the test would violate the ADEA.

The EEOC's regulations are also supported by the congressional findings and legislative history of the ADEA. Both the findings and the Report that gave rise to the statute expressly refer to conduct that would give rise only to disparate impact, not disparate treatment, liability. Moreover, the purpose of the ADEA (like Title VII) is to eliminate workplace discrimination, and this Court's precedents establish that disparate impact claims further that goal in multiple respects: by combating discrimination that rests on subconscious stereotypes; by overcoming problems of proof raised by purposeful but veiled discrimination; and by addressing otherwise innocent practices that disadvantage protected employees but lack any reasonable business justification.

The Fifth Circuit's holding that the ADEA categorically prohibits disparate impact claims in all instances should accordingly be reversed, and the case remanded so that the lower courts can address the further issues raised by petition-

ers' claim, consistent with Congress's intention that the statute be given a practical construction.

ARGUMENT

This case presents the question whether the ADEA *categorically precludes* disparate impact claims. For the reasons described *infra*, the answer to that question is no. The case does *not* present any of the distinct questions relating to the scope or elements of such a cause of action or of defenses, such as the provision permitting differentiation among employees based on "reasonable factors other than age," 29 U.S.C. 629(f)(1). These questions were not litigated below and must be addressed by the lower courts in the first instance. In doing so, the lower courts can be expected to approach disparate impact liability "in a practical way," *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002), accounting for the policy and judicial manageability concerns the respondents have asserted.[4] In any event, even though ADEA disparate impact claims have been recognized by the regulatory agencies since 1968, see 33 Fed. Reg. 9173 (June 21, 1968), were uniformly recognized by the courts of appeals until 1993, and are still recognized in several circuits, none of these purported problems has yet manifested itself.

[4] For example, the EEOC has stated that "disparate impact 'is probably a more difficult claim to make under the ADEA than in a race or gender context because the impact of neutral policies which fall disproportionately on class members protected by the ADEA can be proven to be related to legitimate business reasons in more instances than those which might impact other protected groups.'" Br. of EEOC, *Sitko* v. *Goodyear Tire & Rubber* (CA6 No. 02-4083) 21 (quoting *Adams* v. *Florida Power Corp.*, 255 F.3d 1322, 1327 (CA11) (Barkett, J., concurring specially), cert. granted, 534 U.S. 1054 (2001), and cert. dismissed, 535 U.S. 228 (2002)).

I. The EEOC's Recognition Of Disparate Impact Claims Represents The Better Construction Of The ADEA.

A. The EEOC's Interpretation Is Faithful To This Court's Decision In *Griggs* v. *Duke Power Co.*, Which Construed The Identical Language Of Title VII, On Which Congress Modeled The ADEA.

1. The EEOC's regulations providing for disparate impact claims under the ADEA relied expressly on this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). See 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981). At issue in *Griggs* was section 703(a)(2) of the Civil Rights Act of 1964, the provision of Title VII that renders it unlawful for any employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2). This Court held that Title VII encompasses disparate impact claims. Particularly when it came to employment practices that disproportionately excluded members of a protected class, the Court found that "the conclusion is inescapable" that such practices cannot survive unless they are "job related." 401 U.S. at 436.

Griggs rests on a construction of the text of section 703(a)(2). "The objective of Congress in the enactment of Title VII is plain *from the language of the statute*." *Griggs*, 401 U.S. at 429 (emphasis added). The "thrust" of section 703(a)(2) was to address "the *consequences* of employment practices, not simply the motivation." *Id.* at 432. As this Court subsequently confirmed, *Griggs*'s recognition of disparate impact claims "reflects *the language of § 703(a)(2)* and Congress' basic objectives in enacting the statute." *Connecticut* v. *Teal*, 457 U.S. 440, 448 (1982) (emphasis added).

Congress itself has twice embraced this Court's holding in *Griggs* that the language of section 703(a)(2) encompasses

disparate impact claims. When Congress amended Title VII in 1972 to extend the Act's protections to government employees, it "recognized and endorsed * * * [*Griggs*'s] disparate-impact analysis." *Connecticut* v. *Teal*, 457 U.S. 440, 447 n.8 (1982). Subsequently, the Civil Rights Act of 1991 "confirm[ed] [the] statutory authority and provide[d] statutory guidelines for the adjudication of disparate impact suits under title VII." Civil Rights Act of 1991, § 3(3), 42 U.S.C. 1981 note.[5] Both times, in reaffirming the cognizability of disparate impact claims, Congress left untouched the prohibitory language of section 703(a)(2). Clearly, then, Congress considers its original language – that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin" – entirely adequate to reach disparate impact claims.[6]

2. The provision of the ADEA at issue in this case, section 4(a)(2), exactly parallels the provision of Title VII at issue in *Griggs*. The only difference is that the ADEA prohibits employer conduct with an adverse impact on the basis of "age." 29 U.S.C. 623(a)(2). The EEOC was thus surely correct in determining that the better reading of the ADEA is the one that parallels this Court's construction of the identical language of Title VII, a construction Congress has expressly and repeatedly embraced. At the very least, the EEOC's construction was certainly not unreasonable.

[5] See 42 U.S.C. 2000-e2(k)(1)(A) ("An unlawful employment practice based on disparate impact is established" if "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of a [protected trait] and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."). See generally *id.* § 2000-e2(k).

[6] Cf. *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993) (congressional statutes are presumed to have adopted the extant holdings of the Supreme Court); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Not only is similarity of language generally "a strong indication that the two statutes should be interpreted *pari passu*," *Northcross* v. *Board of Education*, 412 U.S. 427, 428 (1973),[7] but this is the paradigmatic case for the application of that principle of statutory construction. The relevant provisions of Title VII and the ADEA do not merely share a single word or a discrete phrase, but rather are identical. Nor is this similarity merely fortuitous. As this Court has observed, Congress took the prohibitory language of the ADEA "*in haec verba* from Title VII." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)). Further, "the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace." *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979). See also *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995); *Lorillard*, 434 U.S. at 584; cf. *Northcross*, 412 U.S. at 428 (presumption in favor of interpreting identical language similarly is en-

[7] See also, *e.g.*, *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) ("[Congress] used the same words [in section 1964(c) of RICO as it had in section 7 of the Sherman Act and section 4 of the Clayton Act], and we can only assume it intended them to have the same meaning that courts had already given them."); *U.S. Dep't of Energy* v. *Ohio*, 503 U.S. 607, 626 (1992) ("Congress' use of the same language in § 1323(a) [of the Clean Water Act as in 28 U.S.C. 1331] indicates a likely adoption of our prior interpretation of that language."); *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001) (noting that the phrase "final action" "bears the same meaning in § 307(b)(1) [of the Clean Air Act] that it does under the Administrative Procedure Act"); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 221 (2001) (Scalia, J., concurring in the judgment).

hanced when "the two provisions share a common *raison d'être*" (quoting *Johnson* v. *Combs*, 471 F.2d 84, 86 (CA5 1972))).[8]

On those bases, this Court has repeatedly given the same construction to the substantive provisions of Title VII and the ADEA. In *Oscar Mayer*, this Court held that because section 14(b) of the ADEA, 29 U.S.C. 633(b), "is almost *in haec verba* with," and was derived from, section 706(c) of Title VII, it "may properly conclude that Congress intended that the construction of [the ADEA provision] should follow that of [the Title VII provision]." 441 U.S. at 756. This Court concluded in *Western Air Lines, Inc.* v. *Criswell* that the bona fide occupational qualification (BFOQ) exception to the ADEA, "like its Title VII counterpart, * * * 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA." 472 U.S. 400, 412 (1985) (quoting *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977)). Subsequently, *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 123-24 (1988), held that rules for timely filing a complaint under the ADEA applied equally to Title VII, because the former statute was derived from the latter and the two provisions were "virtually *in haec*

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[8] In *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), this Court summarized the relationship between the statutes in sustaining a claim for relief under the ADEA:

> The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. * * * The substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII. * * * The ADEA and Title VII share common substantive features and also a common purpose: the elimination of discrimination in the workplace.

Id. at 357-58 (citations and internal quotation marks omitted).

verba." And in *Trans World Airlines*, this Court followed Title VII precedent in holding that the ADEA bars employers from doling out a benefit that is "part and parcel of the employment relationship" in a discriminatory fashion. 469 U.S. at 121 (quoting *Hishon* v. *King & Spaulding*, 467 U.S. 69, 75 (1984)).[9]

The cases in which this Court has treated Title VII and ADEA claims differently have generally involved differences in the text and statutory structure outside the scope of the two statutes' identical liability provisions. For example, in *EEOC* v. *ARAMCO*, 499 U.S. 244, 258-59 (1991), the Court declined to apply Title VII extraterritorially in part be-

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[9] See also, *e.g.*, *Olmstead* v. *L.C.*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (noting that the Court has "incorporated Title VII standards of discrimination when interpreting statutes prohibiting other forms of discrimination," and that the Court's "interpretation of Title VII * * * applies with equal force in the context of age discrimination" because the ADEA's substantive provisions were derived from Title VII (quoting *Trans World Airlines, Inc.*, 469 U.S. at 121)); *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 109-12 (1991) (in considering the preclusive effect of state administrative findings on ADEA actions in federal court, the Court construed the relevant ADEA provision as it had the relevant provision in "the closely parallel context" of Title VII, even though the ADEA text was not identically worded); *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (noting that this Court has read narrowly the bona fide occupational qualification defense in Title VII, and that this Court has "read the BFOQ language of § 4(f) of the [ADEA], which tracks the BFOQ provision in Title VII, just as narrowly" (citation omitted)); cf. *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 548 (1999) (Stevens, J., concurring in part and dissenting in part) (noting that the Title VII punitive damages standard enacted in the Civil Rights Act of 1991 is "the same intent-based standard used in the [ADEA]"); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 144-45 (1990) (interpreting section 502(a) of ERISA commensurately with the provision of the Labor Management Relations Act on which it was modeled).

cause Congress had legislatively overruled prior judicial decisions declining to apply the ADEA overseas but had not similarly amended the text of Title VII. Similarly, in *Stevens* v. *Department of the Treasury*, 500 U.S. 1, 7 (1991), this Court construed a provision of the ADEA regarding the relative timing of EEOC administrative claims and civil lawsuits; the Court noted that the language of the ADEA provision stood in "marked contrast" to Title VII's requirements. And in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), this Court held that litigants in ADEA cases have the right to trial by jury, even assuming that parties in Title VII suits did not enjoy that right. The Court's conclusion rested on the fact that "rather than adopting the *procedures* of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures even while adopting Title VII's *substantive* prohibitions." *Id.* at 584-85 (emphases added).[10]

This Court's recent decision in *General Dynamics Land Systems, Inc.* v. *Cline*, 124 S. Ct. 1236 (2004), similarly focuses on a concrete difference in the statutory text. In *Cline*, this Court held that the ADEA does not prohibit discrimination against *younger* workers within the ADEA's protected class. In rejecting an analogy to Title VII, which prohibits race and sex discrimination against white and male employees as well as against minorities and women, the Court reasoned:

> The term "age" employed by the ADEA is not * * * comparable to the terms "race" or "sex" employed by Title VII. "Race" and "sex" are general terms that in every day usage require modifiers to indicate any relatively narrow application. We do not commonly understand "race" to refer only to the black

[10] In *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), in which the Court held that an employee was contractually bound to arbitrate an ADEA case, the Court distinguished prior precedent in the Title VII context; the difference, however, turned not on any difference between the two statutes, but on a difference in the nature of the contracts requiring arbitration.

> race, or "sex" to refer only to the female. But the prohibition of age discrimination is readily read more narrowly than analogous provisions dealing with race and sex.

Id. at 1247. In short, in *Cline*, the ADEA and Title VII could not be interpreted *pari passu* because (in contrast to this case) the operative language of the ADEA was *not* derived *in haec verba* from Title VII.

B. The Text Of The ADEA Supports The EEOC's Determination That Disparate Impact Claims May Be Brought Under The ADEA.

Despite the identity between section 703(a)(2) of Title VII, which undeniably encompasses disparate impact claims, and section 4(a)(2) of the ADEA, two textual arguments have been advanced to support the conclusion that Congress did not intend to recognize disparate impact claims under the ADEA. First, the Fifth Circuit relied heavily on the fact that, unlike Title VII, the ADEA contains a provision that permits an employer to engage in "otherwise prohibited" conduct "where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1) (hereinafter, the "RFOA provision"). See Pet. App. 14a-15a. Second, other courts have argued (although the Fifth Circuit did not) that the ADEA's bar on discrimination "because of" age embodies a purpose requirement (notwithstanding that this Court held in *Griggs* that the identical language of Title VII recognizes disparate impact claims). Neither argument is persuasive.

1. The ADEA's "Reasonable Factors Other Than Age" Provision Reinforces The Conclusion That Disparate Impact Claims Are Cognizable.

1. The court of appeals discounted the identity of the prohibitory language in Title VII and the ADEA, relying instead on a rough similarity between the ADEA's RFOA pro-

vision and a phrase that appears in the EPA.[11] See Pet. App. 15a-17a. It reasoned that disparate impact claims are precluded under the Equal Pay Act because the Act permits differential treatment based on "any factor other than sex," and that exception cannot be distinguished from the RFOA provision of the ADEA. See *id.*

The Fifth Circuit trebly erred. First, there is in fact a crucial textual difference between the two provisions that the court of appeals deemed indistinguishable. The ADEA protects an employer only when it has acted on the basis of a

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[11] The ADEA and the Equal Pay Act have very different structures. The phrase on which the majority below relied is buried in the middle of the prohibitory language of the Equal Pay Act, which provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential *based on any other factor other than sex*: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. 206(d)(1) (emphasis added).

The Equal Pay Act also reaches only a subset of the practices covered by the ADEA and Title VII, because it addresses only wages and compensation. A broader reading of the Equal Pay Act would render Title VII's express application to discrimination on the basis of "sex" surplusage.

"*reasonable* factor other than age," 29 U.S.C. 623(f)(1) (emphasis added), while the Equal Pay Act permits differential pay based on "*any* other factor other than sex," 29 U.S.C. 206(d)(1) (emphasis added), even if that factor is objectively *un*reasonable.

Indeed, the RFOA provision affirmatively supports the conclusion that the ADEA recognizes disparate impact claims. The text of section 4(f)(1) addresses actions that would "*otherwise*" be prohibited under section 4(a) and encompasses two categories of employment practices: (1) those where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," and (2) those "where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). The first category insulates from liability certain forms of purposeful discrimination, in which an employee's age is a genuine measure of whether the employee can do the job – for example, younger police officers might be required for undercover work at a high school. By contrast, the second category, the RFOA provision, cannot be read to shield from liability *any* category of intentional discrimination on the basis of age: by its very language, it applies only when employees are treated differently on the basis of some other factor. This provision necessarily implies that it is possible to violate section 4(a) through differentiation based on a factor other than age – that is, without having a discriminatory purpose.[12]

The RFOA provision thus specifies that no disparate impact claim will lie unless that non-age factor is *unreasonable* – a requirement that would be mere surplusage if no disparate impact claims were cognizable in the first place. As the EEOC has explained, "If § 623(f)(1) exempted all age-neutral

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[12] To prove an ADEA disparate *treatment* claim, a plaintiff necessarily must prove that the employer differentiated based on age specifically – not based on any other factor, even if that factor is closely correlated with age. See *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 611-12 (1993).

practices from the ADEA, the term 'reasonable' would be meaningless. The more logical interpretation of the provision is that Congress intended to set some limits on the use of age-neutral factors that have an adverse effect on older workers, in keeping with the type of business-necessity justification that the Supreme Court first recognized in *Griggs*." Br. of EEOC, *Sitko* v. *Goodyear Tire & Rubber* (CA6 No. 02-4083) 7 (citation omitted). Accordingly, the EEOC has specified that under its regulations a disparate impact on protected employees may give rise to liability, but not in cases in which the policy causing the disparate impact is a "*reasonable* measure of job performance." Br. of EEOC, *Meacham* v. *Knolls Atomic Power Lab.* (CA2 No. 02-7474) 7 (quoting *Bryant* v. *City of Chicago*, 200 F.3d 1092, 1098-99 (CA7 2000)) (emphasis added).[13]

The Fifth Circuit's next error was that there is no basis for either its guess that the Equal Pay Act likely "spawned" the RFOA provision, or its conclusion that Congress therefore intended the scope of the ADEA's prohibition to track that of the EPA.[14] In fact, the RFOA provision "was derived from an

[13] The EEOC's ADEA implementing regulations provide that the employer may defend its conduct as a "business necessity," 29 C.F.R. 1625.7(d), a term that the EEOC construes to mean "reasonable." The EEOC took the term "business necessity" from this Court's decision in *Griggs*, 401 U.S. at 431, which explained that employers may use "*reasonable* measure[s] of job performance," *id.* at 436 (emphasis added). This case does not present the question whether the business necessity defenses available under the ADEA and Title VII differ.

[14] See *Adams* v. *Fla. Power Corp.*, 255 F.3d 1322, 1329 (CA11) (Barkett, J., specially concurring) (criticizing the analogy between the EPA and the ADEA in part on the ground that disparate impact "concerns the substantive provisions of the ADEA, which have been recognized to share common substantive provisions as Title VII, and not the remedial provisions of the ADEA which are similar to the remedial provisions of the EPA"), cert. granted, 534 U.S. 1054 (2001), and cert. dismissed, 535 U.S. 228 (2002).

equal-pay bill that was never enacted." Michael Evan Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 BERKELEY J. EMP. & LAB. L. 1, 58-62 (2004). See also H.R. 5110, 88th Cong. (1963) (early version of the equal pay bill allowing an exception for "*reasonable* differentiation based on a factor or factors other than sex" (emphasis added)).

Third, even if the ADEA's requirements *did* track those of the Equal Pay Act, the Fifth Circuit would in any event have been mistaken in asserting that disparate impact claims were therefore barred. This Court has never held that disparate impact claims are unavailable under the Equal Pay Act. The decision cited by the court of appeals, *County of Washington* v. *Gunther*, 452 U.S. 161, 170 (1981), held that employers may prevail if "their pay differentials are based on a *bona fide* use of 'other factors other than sex'" (emphasis added). As several courts of appeals have held after *Gunther*, under this "bona fide" requirement, the employer's policy must be "reasonable" and related to valid business concerns; claims alleging a disparate impact on pay resulting from the use of unreasonable criteria other than sex are thus permissible.[15]

[15] See, *e.g.*, *Cullen* v. *Indiana Bd. of Trustees*, 338 F.3d 693, 699 (CA7 2003) ("the EPA does not require proof of discriminatory intent"); *Aldrich* v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (CA2 1992) (requiring that the "employer prove[] that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue"); *EEOC* v. *J.C. Penney Co.*, 843 F.2d 249, 253 (CA6 1988) (the provision "cannot constitute a blanket bar to all claims of wage discrimination based on disparate impact because the 'factor other than sex' defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason") (emphasis in original). Contra *Adams* v. *Fla. Power Corp.*, 255 F.3d 1322, 1325

2. The Phrase "Because Of" In Subsection (a)(2) Does Not Preclude Disparate Impact Claims.

The argument that the phrase "because of" precludes disparate impact claims under the ADEA is almost incomprehensible given the presence of precisely the same language in Title VII. *Griggs* and its progeny expressly rely on the text of Title VII in recognizing disparate impact claims. See *supra* Part I-A. Thus, to the extent respondents rely on the phrase "because of" in section 4(a)(2), they are inescapably arguing that *Griggs* was wrongly decided. But this case presents no circumstance that warrants reversing *Griggs*, particularly given Congress's subsequent, repeated endorsement of that decision. *Stare decisis* is thus decisive.[16]

In any event, the phrase "because of" – unlike such terms as "willfully," or "purposefully," or "knowingly" – does not refer to an actor's state of mind in all (or even most) contexts, including in the ADEA. Rather, it refers to causation. The nature of the causation depends on context. In some contexts, that causation may turn on an actor's motivation, as when an employer refuses to hire an older worker because he assumes that the older worker will be less productive than a younger one. There, age is both a "but for" cause of the failure to hire and a motivation.

(CA11), cert. granted, 534 U.S. 1054 (2001), and cert. dismissed, 535 U.S. 228 (2002); *Mullin* v. *Raytheon Co.*, 164 F.3d 696, 702 (CA1 1999); *Ellis* v. *United Airlines, Inc.*, 73 F.3d 999, 1008 (CA10 1996).

[16] See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); see also *Hohn* v. *United States*, 524 U.S. 236, 261-62 (1998) (Scalia, J., dissenting) (arguing that Congress's reliance upon an unrepudiated decision in creating a procedural scheme is a "special reason" for according *stare decisis* effect).

But a policy can "adversely affect [an employee] because of such individual's age" (29 U.S.C. 623(a)(2)) even if that policy is not motivated by age. For example, a physical strength test that adversely affects older employees does so *because* of their age (assuming, as a plaintiff would have to prove, that physical strength is negatively correlated with age), and the ADEA would bar such a test unless it were reasonable for the particular job. See EEOC *Sitko* Br. 21 ("[I]t might be perfectly legitimate for an employer to adopt a strength test for an iron worker's job – even if the effect of doing so is to disqualify a disproportionate number of older workers. But that would not be true for a sedentary job such as a librarian. In that case, a strength test would be an unreasonable barrier to employment for older workers while serving no legitimate interest of the employer." (citation omitted)).

This understanding of "because of" is reinforced by the grammatical structure of section 4(a)(2). The phrase "because of such individual's age" in the Act plainly describes the "[e]ffect" on the employee. Had Congress wished to restrict the ADEA to purposeful discrimination, it would more naturally have placed the words "because of" far earlier in the provision, such that they would have described the *employer's* acts: "It shall be unlawful for an employer, *because of an employee's age*, to limit, segregate, or classify * * *." Even more clearly, had Congress wished to restrict the ADEA to purposeful discrimination, it could have included words such as "willful," "purposeful," "knowing," "deliberate," or "malice" in the statutory language. Cf. 42 U.S.C. 1981a(b)(1) (providing for punitive damages in Title VII cases when the plaintiff can show "malice" or "reckless indifference").

The statute's grammar moreover precludes reading the text as if the employer's conduct is directly modified by the "because of" clause. In section 4(a)(2), the conduct describes employees in the plural form; the "because of" clause takes the singular form. Thus, the Fifth Circuit's decision requires reading the statute to render it unlawful for an employer "to

limit, segregate, or classify his *employees* * * * because of such *individual's* age." By contrast, petitioners' reading is grammatically correct: with respect to any petitioner, the statute renders presumptively unlawful conduct that would "adversely affect *his* status as an *employee*, because of such *individual's* age."

The merit of the EEOC's reading is also apparent from the contrast between section 4(a)(2) and the RFOA provision in section 4(f)(1). The RFOA provision uses language that *does* of necessity connote intentionality. It refers to "differentiation * * * *based on* reasonable factors other than age." 29 U.S.C. 623(f)(1) (emphasis added). The phrase "based on" means "founded on" or "derived from," and accordingly does generally refer to purpose or reasoning. See THE NEW OXFORD AMERICAN DICTIONARY 135 (2001) (the first definition of "base" and "be based" is "have as the foundation for (something); use as a point from which (something) can develop"). Thus, after the plaintiff has demonstrated a disparate impact, such that the defendant is liable under section 4(a)(2), the court *then* must consider the factor that *motivated* the employer, and determine whether that factor was reasonable.

But even if (contrary to the foregoing) the phrase "because of" were instead read to refer only to intentional discrimination, disparate impact claims would still be a cognizable method of proof. As we explain *infra* Part I-C, by forcing employers to articulate reasonable, non-discriminatory justifications for policies that have a disparate impact on older workers, disparate impact claims ferret out intentional discrimination that is couched in non-discriminatory terms. Thus, whether "because of" is construed as referring to causation (as petitioners contend) or instead only to intent (as respondents contend), disparate impact claims are cognizable.

C. The Purpose Of The ADEA Confirms The EEOC's Conclusion That Disparate Impact Claims Are Cognizable.

1. The EEOC's regulatory determination that the ADEA reaches disparate impact claims is reinforced by Congress's purpose in enacting the statute. The best evidence of Congress's purpose, of course, is the ADEA's text, which, like Title VII, provides for disparate impact liability. See *supra* Parts I-A & -B. Moreover, the "ADEA and Title VII share" not merely "common substantive features," but also "a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979)). As this Court recognized in *Griggs*, disparate impact liability is essential to achieving this purpose, because facially neutral treatment when applied to people who are not equally situated can simply entrench that inequality:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has – to resort again to the fable – provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

401 U.S. at 431.

The congressional findings accompanying the ADEA similarly recognize the need for disparate impact liability. Congress went beyond addressing facially discriminatory practices, such as "the setting of arbitrary age limits regardless of potential for job performance," to recognize as well that "certain *otherwise desirable practices* may work to the

disadvantage of older persons." 29 U.S.C. 621(a)(2) (emphasis added). Similarly, the report of the Department of Labor (the so-called Wirtz Report) that Congress requested and which provided the underpinnings to the ADEA, advised Congress that it would be "futile as public policy, and even contrary to the public interest," to focus solely on the elimination of explicit age limits. U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (1965) [hereinafter Wirtz Report] at 21, *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 37 (1981) [hereinafter LEGISLATIVE HISTORY]. Instead, the Report noted that legislation should address other sources of age discrimination, such as "employment security and income maintenance programs [that] are having a *wholly unintended adverse effect* on the position of older workers who are unemployed." *Id.* (emphasis added). And the Report identified the larger problem of "institutional arrangements that indirectly restrict the employment of older workers." *Id.* at 15-17, *reprinted in* LEGISLATIVE HISTORY at 32-34. The Report concluded that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite *unintentionally* lead to age limits in hiring." *Id.* at 22, *reprinted in* LEGISLATIVE HISTORY at 38 (emphasis added).

Of note, the Wirtz Report cites as an improper employment practice precisely the job criterion that this Court struck down in *Griggs* under a disparate impact theory: a requirement that new employees have graduated from high school that reflects no relationship to job performance. The Report observes that "[a]ny employment standard" of this sort "will obviously work against the employment of many workers – unfairly, if despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of

a high school education." Wirtz Report at 3, *reprinted in* LEGISLATIVE HISTORY at 21.

To be sure, this Court indicated in *Hazen Paper* that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA." 507 U.S. at 610. But "the essence" is not the same thing as "the entirety," and *Hazen Paper* expressly avoided addressing the availability of disparate impact claims. *Id.* "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Int'l B'hood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Yet Title VII recognizes disparate impact claims. Both Title VII and the ADEA thus illustrate the fact that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

2. The EEOC has thus rightly concluded that disparate impact liability is essential to achieving Congress's goals in enacting the ADEA. Categorically prohibiting such claims would, the EEOC has explained, "greatly weaken[] the protections of the ADEA because it [would] allow[] employers to use arbitrary employment practices that disproportionately screen out older workers. When these practices have no connection to the requirements of the job, they undermine the purpose of the ADEA – 'to promote employment of older persons based on their ability rather than age.' 29 U.S.C. § 621(b)." EEOC *Sitko* Br. 1.

Disparate impact claims are a vital tool for combating workplace discrimination, including age discrimination. Members of the protected group may be the victims of "subconscious stereotypes and prejudices," *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), that disadvantage them, even when an employer does not engage in knowing discrimination. In the age context in particular, there is an

acute problem of subconscious discrimination that by definition cannot be combated through disparate treatment liability alone. See *Gen. Dynamics Land Sys.* v. *Cline*, 124 S. Ct. 1236, 1242 (2004) (recognizing that older workers are "more apt to be tagged with demeaning stereotype[s]"); *EEOC* v. *Wyoming*, 460 U.S. at 231 (recognizing that the ADEA seeks to proscribe age discrimination "based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes"). Inappropriate age-based distinctions are generally rooted not in bigotry but in ignorance and false assumptions. "Age stereotypes persist because people tend not to examine the basis for these stereotypes and also give disproportionate weight to any data they believe tend to support them." RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE 26-27 (2001). Employers therefore tend not to self-police their policies for those that will disproportionately disadvantage the elderly with no legitimate business justification. Steven J. Kamenshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 318 (1990).

Disparate impact liability is furthermore essential because otherwise even purposeful discrimination may escape detection and proof. In *EEOC* v. *Wyoming*, this Court recognized that intentional discrimination is often cloaked through the use of pretextual justifications. 460 U.S. 226, 231 (1983). "[T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes.' This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw." *EEOC* v. *Francis W. Parker Sch.*, 41 F.3d 1073, 1080-81 (CA7 1994) (Cudahy, J., dissenting), cert. denied, 515 U.S. 1142 (1995). See also Jan W. Henkel, *The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages After* Hazen Paper Co. v. Biggins, 47 SYRACUSE L. REV. 1183, 1185 (1997) (observing that disparate impact analysis was intended to be a

"potent tool * * * for older Americans who fall victim to employers able to cloak their actions in economics or feigned ignorance").

Finally, policies that disparately harm protected groups may be harmful even if the employer's motivation (conscious or subconscious) is entirely innocent. A "facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices." *Watson*, 487 U.S. at 990. And "good intent or absence of discriminatory intent does not redeem employment procedures * * * that operate as 'built-in headwinds' for [protected groups] and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432. "The disparate-impact theory serves a vital role in preventing arbitrary employment practices that disadvantage protected workers without serving employers' legitimate business interests. These practices are just as pernicious when the protected group is older workers as when it is a racial minority." EEOC *Sitko* Br. 4.[17]

II. The EEOC's Regulations Are Entitled To *Chevron* Deference.

The EEOC's regulations providing that disparate impact claims are cognizable under the ADEA and the guidance previously provided by the Department of Labor have all the hallmarks of agency determinations entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Coun-*

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[17] To be sure, age discrimination does not carry with it all of this history and profound prejudice underlying race discrimination. But Title VII notably is not limited to race discrimination, and the "principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent" is not limited "to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988). See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (claim of disparate impact on the basis of gender).

cil, Inc., 467 U.S. 837 (1984). This Court's precedents establish the following factors as especially important in identifying agency regulations that merit *Chevron* deference: (1) whether Congress has expressly authorized the agency "to engage in the process of rulemaking * * * that produces regulations * * * for which deference is claimed," and (2) whether the regulations are the "fruit[] of notice-and-comment rulemaking." *United States* v. *Mead Corp.*, 533 U.S. 218, 229, 230 (2001). Both of these criteria are satisfied here.[18]

First, Congress specifically authorized the EEOC (and the Secretary of Labor before it) to promulgate "such rules and regulations as [the Commission] may consider necessary or appropriate for carrying out" the ADEA and to establish "such reasonable exemptions to and from any or all provisions of this Act as [it] may find necessary and proper in the public interest." 29 U.S.C. 628. See also, *e.g.*, *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 448, 448-51 (2003) (noting that the EEOC "has special enforcement responsibilities" under several federal antidiscrimination statutes, including the ADEA); *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412 (1985) (noting that the EEOC and the Secretary of Labor are "the administrative agencies charged with enforcing the [ADEA]").

Second, the EEOC adopted the disparate impact regulation in question pursuant to notice-and-comment rulemaking, and indeed "made changes to the regulation in response to public comment." EEOC *Sitko* Br. 12 (citing 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981)). See 44 Fed. Reg. 37,974 (June 29, 1979); 44 Fed. Reg. 68,858 (Nov. 30, 1979); 46 Fed. Reg. 47,724 (Sept. 29, 1981). By comparison, the EEOC regulations embracing a disparate impact standard under Title VII – regulations to which this Court accorded "great deference" in *Griggs* v. *Duke Power*, 401 U.S. 424, 434 (1971) – were adopted under far less formal circumstances, neither pursuant to an express congressional delegation of rulemaking authority nor following notice and the opportunity for public comment. See, *e.g.*, 35 Fed. Reg. 12,333 (Aug. 1, 1970).

[18] Notably, the courts of appeals have applied *Chevron* deference to the EEOC's regulatory interpretations of the ADEA in numerous cases. See, *e.g.*, *Sanchez* v. *Pacific Powder Co.*, 147 F.3d 1097, 1099-1100 (CA9 1994); *Kralman* v. *Ill. Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (CA7 1994).

In both these respects, the EEOC's ADEA disparate impact regulation differs from the EEOC interpretations of Title VII to which this Court has previously declined to defer. In *EEOC* v. *ARAMCO*, 499 U.S. 244, 256-58 (1991), on which the Fifth Circuit relied in this case, and which followed *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140-46 (1976), this Court pointed to the EEOC's lack of substantive rulemaking authority under Title VII. That criterion, whatever its significance in the Title VII context, see *ARAMCO*, 499 U.S. at 259-60 (Scalia, J., dissenting), is inapplicable to the ADEA, which unambiguously gives just such authority to the EEOC. Compare 29 U.S.C. 628 (permitting the EEOC to "issue such rules and regulations as it may consider necessary or appropriate for carrying out [the ADEA]") with 42 U.S.C. 2000e-12(a) (permitting the EEOC "to issue * * * suitable *procedural* regulations to carry out [Title VII]") (emphasis added).

Furthermore, as discussed *supra*, none of the Title VII interpretations at issue in these cases have been a product of notice-and-comment rulemaking like the ADEA regulations at issue here. Compare *ARAMCO*, 499 U.S. at 256-57 (denying deference to an intra-litigation policy statement, a letter, testimony by its Chairman, and a Commission decision). This factor similarly distinguishes *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), on which the Fifth Circuit also mistakenly relied. In *Christensen*, this Court refused to accord *Chevron* deference to a Department of Labor opinion letter, which lacked the force of law and which interpreted an ambiguous Department of Labor regulation, rather than a rule arrived at after notice-and-comment rulemaking and which interprets the congressional statute itself. 529 U.S. at 586-87.

To be sure, the EEOC labeled the regulations at issue in this case as "interpretive." But the only purpose of that designation was to allow the EEOC to "invok[e] an exception to the 30-day delay in effective date required by 5 U.S.C. § 553(d)." EEOC *Sitko* Br. 13. This Court's precedents reject the suggestion that the application of *Chevron* deference should turn on the regulation's mere labeling or the observance of a thirty-day delay. No such delay was observed in the interpretive regulations at issue in *Chevron* itself, which went into effect the day they were promulgated. See 467 U.S. 837, 840-41 (1984); 46 Fed. Reg. 50,766 (Oct. 14, 1981). And such a delay would in no way have enhanced the EEOC's expertise or the soundness of its judgment, which has remained unchanged for the subsequent twenty-three years.

Moreover, this Court has recognized that interpretive regulations may properly warrant *Chevron* deference even when *no* notice-and-comment procedures are involved. *Mead*, 533 U.S. at 230-31; *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (agreeing with the EEOC's interpretation while noting that "deference under [*Chevron*] does not necessarily require an agency's exercise of express notice-and-comment rulemaking power"); see *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) (deferring to a letter of the Comptroller of the Currency because he "is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws" (quoting *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987))); see also *Edelman*, 535 U.S. at 123-24 (Thomas, J., concurring) (arguing that *Chevron* deference is appropriate even to an EEOC Title VII interpretive regulation adopted without notice-and-comment procedures because it was "codified in the Code of Federal Regulations, and so is binding on all the parties coming before the EEOC, as well as on the EEOC itself"); *Christensen*, 529 U.S. at 590-91 (Scalia, J., concurring in part and concurring in the judgment) (reciting cases in which this Court has accorded

Chevron deference to "authoritative agency positions set forth in a variety of" formats other than legislative regulations, including a longstanding interpretation embodied in a no-action notice).

Several additional factors compel the application of *Chevron* deference in this case. First, the Commission and, before it, the Department of Labor have maintained the same interpretation of the ADEA consistently for decades. See *Barnhart* v. *Walton*, 535 U.S. 212, 221-22 (2002) (holding that an agency interpretation is entitled to *Chevron* deference because, in part, of its long standing). The agency has maintained this position not only administratively but also in litigation. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (an agency's litigation position is entitled to *Chevron* deference when it represents a "fair and considered judgment" and not a "post hoc rationalization"). "The Commission has consistently defended this interpretation in the courts, arguing that a claim of discrimination under a disparate impact theory is cognizable under the ADEA." EEOC *Meacham* Br. 18-19.[19]

In the course of evaluating its litigation position, the EEOC has continued to take account of relevant developments. For example, the Commission has addressed this Court's decision in *Hazen Paper*, concluding that while *Hazen Paper* "recognized the primacy of the disparate-treatment theory" in the ADEA as in Title VII, it "does not deny the existence of the disparate impact theory." EEOC *Sitko* Br. 20.

Second, the EEOC's interpretation is also entitled to deference because it was originally promulgated (by the Secretary of Labor) contemporaneously with the enactment of the ADEA. "[T]he Department's earliest interpretations of the

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[19] For recent examples, see, *e.g.*, *Meacham* v. *Knolls Atomic Power Lab.* (CA2 No. 02-7474) (pending); *Sitko* v. *Goodyear Tire & Rubber* (CA6 No. 02-4083) (pending); *EEOC* v. *McDonnell Douglas Co.*, 191 F.3d 948 (CA8 1999); *Ellis* v. *United Airlines*, 73 F.3d 999 (CA10 1996).

ADEA recognize the viability of the disparate-impact theory." EEOC *Sitko* Br. 4. Those interpretations recognized "that the ADEA prohibited some age-neutral practices that had an adverse effect on older workers" – for example, they demanded that age-neutral evaluation factors such as quantity or quality of production have "a valid relationship to job requirements," and that age-neutral physical-fitness factors be "reasonably necessary for the specific work to be performed." EEOC *Meacham* Br. 12 (quoting 29 C.F.R. 806.103(f)(2), 806.103(f)(1)(i)); see also EEOC *Sitko* Br. 17 (explaining that EEOC's current interpretation reflects the "contemporaneous views of the agency initially entrusted with enforcing the ADEA). Departmental opinion letters similarly reflected this interpretation. See Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1105 & n.204 (1998) (reciting advisory opinions that asserted that "facially-neutral job requirements, such as testing, must be validated and job-related").

This contemporaneous understanding of the statute enhances the deference owed to the EEOC's regulation. This Court has observed that particular respect is due when an agency "was intimately involved in the drafting and consideration of the statute by Congress" and its "interpretation represents 'a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Aluminum Co. of Am.* v. *Cent. Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984)). See *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414 (1993); *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412 (1985) (deferring to an EEOC interpretation inherited from the Department of Labor's contemporaneous construction of the ADEA's BFOQ exception). Such deference is particularly due here given that a report by the Department of Labor gave rise to the ADEA's adoption. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969) (special deference to an agency's

contemporaneous construction applies "when the administrators participated in drafting and directly made known their views to Congress").

Third, *Chevron* deference is owed to the EEOC's regulation on the ground that the agency's consistent position has not been disturbed by Congress. As noted, the regulations of first the Department of Labor and later the EEOC have been consistent since 1968, while the federal courts uniformly agreed until 1993.[20] Moreover, during the twenty-seven-year period between the ADEA's adoption in 1967 and 1993, Congress amended the statute twelve times. Yet it never questioned the agencies' construction of the statute. And in both 1982 and 1991, Congress reaffirmed that the identical text of Title VII authorizes disparate impact claims.[21]

In these circumstances, Congress can fairly be deemed to have acquiesced in the regulatory construction of the statute. See *Boeing Co.* v. *United States*, 537 U.S. 437, 457 (2003) (noting that Congress's failure to legislatively override the preexisting regulatory interpretation when revising a statutory scheme "serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent"); *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 118 (2002) ("By amending the law without repudiating the regulation, Congress 'suggests its consent to the [EEOC's] practice.'" (quoting *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S.

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[20] See, *e.g.*, *Fisher* v. *Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1244-45 (CA7 1992); *Abbott* v. *Fed. Forge, Inc.*, 912 F.2d 867, 872 (CA6 1990); *Lowe* v. *Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1369-70 (CA2 1989).

[21] The Senate Report on the Older Workers' Benefit Protection Act of 1990 also expressly approves the EEOC's RFOA guidelines, as well as citing with approval *Laugesen* v. *Anaconda Co.*, 510 F.2d 310, 315 (CA6 1975), which recognizes that disparate impact claims are cognizable under the ADEA. See S. Rep. No. 263, at 29-30, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1535.

590, 600 n.17 (1981))); *Associated Dry Goods Corp.*, 449 U.S. at 600 n.17 ("In the 15 years during which the [EEOC] has consistently allowed limited disclosure to the charging party, Congress has never expressed its disapproval, and its silence in this regard suggests its consent to the Commission's practice."); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Finally, when *Chevron* deference is applied to the EEOC's construction of the statute, the result is obvious: the regulations are binding. The most that respondents could hope to establish is that the text of the ADEA is ambiguous, but the agency's construction resolves any such ambiguity. See *Chevron*, 467 U.S. at 843 (holding that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"); *id.* at 844 (regulations are entitled to "controlling weight"). Likewise, applying the second step of the *Chevron* analysis, the EEOC's view can only be considered reasonable, because it directly follows this Court's own analysis of the indistinguishable text of Title VII in *Griggs*. For this Court to find otherwise would require this Court to hold that *Griggs* was not only wrongly but *unreasonably* decided, and furthermore that a regulatory agency was *unreasonable* in deciding to follow an interpretation of identical statutory language in a then-recent, now longstanding decision of the United States Supreme Court. That conclusion is plainly untenable.[22]

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[22] Even if for some reason this Court were to decline to apply *Chevron* deference, the greatest degree of deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-40 (1944), would plainly apply here, and would produce the same result. Applying *Skidmore*, this Court has granted special weight to agency interpretations that are "well-reasoned" and "cogent," that "rest on a body of experience and informed judgment," and that are "of longstanding duration," all the case here. *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1001 (2004). In *Alaska*, this Court, after applying those factors to an internal agency memorandum (a much less formal interpretation than the one at issue here), then deferred to the agency's view on the grounds that it was a "permissible" and "rational" construction of the statute. *Id.* at 1004; see also *id.* at 1001 (refusing to reject agency reading as "impermissible"). At the very least, the same level of deference is due here, and the EEOC's interpretation, which follows *Griggs* directly, is neither irrational nor impermissible.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

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Supreme Court of the United States

AZEL P. SMITH, *et al.*,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE ADEA DOES NOT PROVIDE FOR DISPARATE IMPACT CLAIMS 7

A. The Text of the ADEA Does Not Recognize Disparate Impact Claims 7

1. Section 4(a) Is Naturally Read as a Disparate Treatment Prohibition 7

2. The ADEA as a Whole Cuts Against Reading Section 4(a) as Providing for Disparate Impact Claims 11

B. The Legislative History Confirms That the ADEA Does Not Recognize Disparate Impact Claims 15

C. Important Pragmatic Considerations Cut Against Reading the ADEA to Provide for Disparate Impact Claims 18

II. *GRIGGS* AND ITS PROGENY UNDER TITLE VII DO NOT SUPPORT RECOGNITION OF ADEA DISPARATE IMPACT CLAIMS 25

TABLE OF CONTENTS
(continued)

Page

III. PETITIONERS' ARGUMENT THAT THE ADEA'S TEXT AND LEGISLATIVE PURPOSES INDEPENDENTLY SUPPORT RECOGNITION OF DISPARATE IMPACT CLAIMS IS IN ERROR 34

A. The Text of the ADEA Does Not Support Recognition of Disparate Impact Claims 34

B. Petitioners' Legislative Policy Arguments Are Also Without Merit 41

IV. THE COURT SHOULD NOT DEFER TO THE EEOC'S VIEW THAT ADEA DISPARATE IMPACT CLAIMS ARE COGNIZABLE 44

CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases

Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) 44

AFSCME, Dist. Council 37 v. New York City Dep't of Parks & Recreation, 113 F.3d 347 (2d Cir. 1997) 18

Akins v. Texas, 325 U.S. 398 (1945) 4

Alexander v. Sandoval, 532 U.S. 275 (2001) 5

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(continued)

Page

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Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992) 22, 23
Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 26, 27, 28, 49
Fort Stewart Schools v. FLRA, 495 U.S. 641 (1990) 37
Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) 36
Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961) 36
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TABLE OF AUTHORITIES
(continued)

Page

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Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) 21
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Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 37, 49
Laugesen v. Anaconda Corp., 510 F.2d 307 (6th Cir. 1975) 47
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 34, 43
Lorillard v. Pons, 434 U.S. 575 (1978) 49
Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) 32, 33
Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364 (2d Cir. 1989) 20, 21
Markham v. Geller, 451 U.S. 945 (1981) 5, 48, 49
Mass. Bd. of Retir. v. Murgia, 427 U.S. 307 (1976) 22, 30

TABLE OF AUTHORITIES
(continued)

Page

Mayor of Philadelphia v. Education Equality League, 415 U.S. 605 (1974) 4
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 29, 36
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Perrin v. United States, 444 U.S. 37 (1979) 40
Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 8, 9, 42
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 8, 38, 41
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TABLE OF AUTHORITIES
(continued)

Page

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81 Stat. 602 ..... 11, 17
17 U.S.C. § 505 27
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Age Discrimination in Employment Act of 1967
29 U.S.C. § 621(a) 14, 41
29 U.S.C. § 621(b) 14
29 U.S.C. § 622(a) 14, 15
29 U.S.C. § 623(a) ..... *passim*
29 U.S.C. § 623(c) 9

TABLE OF AUTHORITIES
(continued)

Page

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29 U.S.C. § 623(f)(2) 12, 45
29 U.S.C. § 623(f)(3) 12, 37
29 U.S.C. § 623(j) 12
29 U.S.C. § 626(b) 19, 40
29 U.S.C. § 626(c) 18
29 U.S.C. § 628 47
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42 U.S.C. § 1981a 18, 40
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TABLE OF AUTHORITIES
(continued)

Page

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Page

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TABLE OF AUTHORITIES
(continued)

Page

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COUNTERSTATEMENT OF THE CASE

1. Petitioners are police and public safety officers employed by respondents, the City of Jackson and its Police Department. J.A. 3-4. Petitioners claim that respondents violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634 (App. 15a-45a), by adopting and implementing new pay plans that, among other things, allegedly had an unlawful disparate impact on officers age 40 and over. J.A. 4-7, 15-31. Petitioners' expert reported that employees age 40 and over had received statistically smaller initial pay raises than officers under age 40. Pet. App. 4a-5a. Respondents' experts reported in reply—without contradiction by petitioners—that, even after initial pay increases, older officers statistically were still paid more overall than younger officers and that younger officers were employed in greater proportions in the lowest ranks where the new pay minimums established the greatest increases over prior pay. App. 3a-6a, 8a-14a (R. 464-66, 478-79, 496-99).

2. The district court granted summary judgment. Pet. App. 39a-48a. It found legally insufficient evidence that the pay plans were adopted or applied with a discriminatory motive. Pet. App. 45a. It also concluded "that the ADEA does not allow for claims of disparate impact." Pet. App. 48a.

3. On appeal, the Fifth Circuit vacated as premature the district court's ruling on the disparate treatment claim. Pet. App. 2a. On the disparate impact issue, however, the Fifth Circuit agreed that the ADEA's prohibitions are "read most naturally as outlawing only conduct motivated by age." Pet. App. 9a. The court also found that the ADEA's "reasonable factors other than age" provision, 29 U.S.C. § 623(f)(1), "counsels against recognizing a disparate impact theory under the ADEA," Pet. App. 13a, and is "a clear textual difference between the ADEA and Title VII regarding employer liability—a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate impact claim

under Title VII . . . controls the cognizability of a disparate impact claim under the ADEA." Pet. App. 17a-18a (footnote omitted). The court further stated that "absent from the scope of the ADEA" are the concerns that, "in the Title VII context, led to the recognition of disparate impact claims." Pet. App. 21a. Judge Stewart dissented on this issue. Pet. App. 28a.

SUMMARY OF ARGUMENT

Consistent with traditional notions that unlawful discrimination requires actual discriminatory intent, this Court has indicated that it will recognize "disparate impact" claims—*i.e.*, claims based on unjustified adverse effects rather than on discriminatory intent—only where there is "convincing evidence" that Congress intended them. The ADEA contains no such evidence.

I. Section 4(a) of the ADEA applies only to employer decisions taken "because of" age, a conventional reference to discriminatory intent. Moreover, by providing that a decision is lawful where "based on reasonable factors other than age," Section 4(f)(1) confirms that non-discriminatory intent is dispositive—an approach that is incompatible with disparate impact claims. In addition, other statutory provisions and legislative history reveal that, rather than prohibit neutral decisions with adverse effects on older workers, the ADEA addresses such disadvantages through education, training, and manpower programs. Finally, disparate impact claims are incompatible with the ADEA's scheme, including its jury trial provision, opt-in procedures, and continuum of protected individuals. Indeed, because non-age factors having differential age-specific impacts are inescapable, recognition of ADEA disparate impact claims would predictably force employers to abandon valuable practices and/or make use of quotas. There is no basis for construing the ADEA to do so.

II. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny under Title VII do not support recognition of

ADEA disparate impact claims. In addition to being enacted before *Griggs*, the ADEA addresses much more limited concerns than does Title VII; in particular, the concerns that led to recognition of disparate impact claims under Title VII are absent in the ADEA. Because older workers as a class have not suffered a history of purposeful unequal treatment, shortcomings in their abilities and performance cannot be attributed to prior discrimination. Moreover, discrimination against older workers is not normally motivated by deep-seated animus, but rather by generalizations about individual workers' abilities to do a job. In any event, even under Title VII, disparate impact claims are not recognized where statutory provisions foreclose them; by making discriminatory intent essential, Sections 4(a) and 4(f)(1) of the ADEA foreclose disparate impact claims.

III. The "independent" textual and legislative purpose arguments that petitioners offer for recognizing ADEA disparate impact claims fare no better. The "reasonable factors other than age" provision does not imply that such claims are cognizable; rather, it confirms that, in both "pretext" and "mixed-motive" cases, no liability may be imposed for actions based on reasonable intentions. Moreover, the "because of" language refers to more than mere causation, as is confirmed by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (requiring a showing of intent as well), and even *Griggs* (also requiring a showing that a practice with adverse impact is demonstrably unjustified). Finally, disparate treatment doctrine fully meets the more limited purposes of the ADEA.

IV. No deference is owed to the view of the Equal Employment Opportunity Commission ("EEOC") that ADEA disparate impact claims are cognizable. The regulation to which petitioners refer neither construes Section 4(a) nor affirmatively recognizes disparate impact claims. Moreover, the Department of Labor ("DOL") did not recognize ADEA disparate impact claims, and the EEOC's later-adopted view

conflicts with briefs of the Department of Justice ("DOJ"), is not supported by valid reasoning, and is contrary to law. Finally, there has been no congressional acquiescence in or ratification of the EEOC's view.

ARGUMENT

This case presents the question whether Section 4(a) of the ADEA, 29 U.S.C. § 623(a), makes actionable "disparate impact" claims—*viz.*, claims that employer decisions that are neutral on their face are unlawful, without regard to whether the employer's motive in making such decisions was the ages of the pertinent individuals, because the decisions have disproportionate adverse effects on older workers and do not have a demonstrated justification. As proved below, the text, structure, and history of the ADEA show that the statute does not provide for "disparate impact" claims.

The essential tradition of federal anti-discrimination law, in its multiple constitutional and statutory manifestations, is to make actionable "disparate treatment" claims—*viz.*, claims that decisions adverse to members of a protected class are unlawful because the decisionmaker's motivating consideration in making the decisions was the protected class trait (*e.g.*, race, gender, age). *See, e.g., Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (Equal Protection and Due Process Clauses); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44 (1954) (National Labor Relations Act). The Court has recognized that statistics may be probative evidence for such "disparate treatment" claims. *See, e.g., Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Mayor of Philadelphia v. Education Equality League*, 415 U.S. 605, 620 (1974). At the same time, out of respect for the essential tradition of federal anti-discrimination law and out of concern for the far-reaching implications of disparate impact theories of liability, the Court has declined to recognize disparate impact claims unless there is "convincing evidence" that the particular anti-discrimination law goes beyond the norm and provides for such claims. *Gen.*

Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982) (42 U.S.C. § 1981). *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 61-74 (1980) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (Equal Protection Clause); *Alexander v. Sandoval*, 532 U.S. 275, 288-93 (2001) (Title VI).

The ADEA contains no such convincing evidence. As this Court held in *Hazen Paper*, "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." 507 U.S. at 610. While not directly resolving the status of disparate impact claims, *id.*, the reasoning of *Hazen Paper*—to wit, that the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore," *id.* at 612 (emphasis in original)—goes far toward showing that the ADEA does not make such claims actionable.

As then-Justice Rehnquist observed 23 years ago, neutral employer decisions—including those with adverse effects on older workers—are not decisions made "because of" age within the meaning of Section 4(a); and the "reasonable factors other than age" provision in Section 4(f)(1) confirms that Congress "did not intend the ADEA to have the restraining influence" on employer decisionmaking that a disparate impact prohibition would have. *Markham v. Geller*, 451 U.S. 945, 948-49 (1981) (Rehnquist, J., dissenting from denial of *certiorari*). Rather, the ADEA embodies the Secretary of Labor's conclusion, reported to Congress, that enacting a prohibition on neutral decisions with adverse effects on older workers is "futile as public policy, and even contrary to the public interest," and that such employer practices and their adverse effects are better countered through non-coercive education, training, and manpower programs. *See* Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 21-25 (1965) (J.A. 77-89).

Contrary to petitioners (Pet. Br. at 2-4, 8, 11-17), *Griggs v. Duke Power Co.*, *supra*, and its progeny under Title VII do not call for an opposite reading of the ADEA. Those Title VII decisions do not hold that prohibitory provisions phrased like Section 703(a) of Title VII (or Section 4(a) of the ADEA) are generally to be read as providing for disparate impact claims. Rather, *Griggs* and its progeny rest on the proposition that it was proper to interpret Title VII as providing for certain disparate impact claims in order to accomplish Congress's objective of addressing the problems of race and gender discrimination in employment, as Congress understood those particular problems. That limited proposition about Title VII does not so much as throw a cross-light on the proper interpretation of the ADEA, which is a separate statute enacted —before *Griggs* was decided—for the separate purpose of meeting what Congress understood to be the distinctly different problem of age discrimination in employment.

Petitioners also err in suggesting (Pet. Br. at 2-3, 7-9, 30-36) that the Court should defer to the EEOC's view that the ADEA provides for disparate impact claims. The interpretive guideline that petitioners cite, 29 C.F.R. § 1625.7(d), is not an interpretation of Section 4(a)—the statutory provision at issue here—and does not affirmatively state that Section 4(a) provides for disparate impact claims. Rather, the guideline addresses Section 4(f)(1) and interprets that statutory provision (unreasonably) to require a showing of "business necessity" to establish that a neutral employer decision with an "adverse impact" on older workers is a decision based on "reasonable factors other than age." While the interpretive guideline apparently rests on the assumption that the ADEA provides for disparate impact claims, courts do not defer to agency assumptions but only to reasoned and lawful agency actions. Such a reasoned and lawful agency action is lacking here.

I. THE ADEA DOES NOT PROVIDE FOR DISPARATE IMPACT CLAIMS

A. The Text of the ADEA Does Not Recognize Disparate Impact Claims

Section 4(a) generally makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

29 U.S.C. § 623(a). On its face and in context, this is a disparate treatment text.

1. Section 4(a) Is Naturally Read as a Disparate Treatment Prohibition

When the ADEA was passed, the "prevailing view" was that, to be unlawful, "discrimination required a purpose or motive to harm an individual because of [the individual's protected trait]"; no court or administrative agency had even suggested, much less ruled, that any anti-discrimination law provided for disparate impact claims. Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 69-71 (1972) [hereinafter "Blumrosen, *Strangers in Paradise*"]; *see also* Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners* 95 (Monte B. Lake ed., 1983) [hereinafter "Blumrosen, *Interpreting the ADEA: Intent or*

Impact"]; Arthur E. Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 Nw. U. L. Rev. 907, 955-58, 970 (1967); Michael E. Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Ind. Rel. L. J. 429, 518-20 (1985). Far from departing from this traditional conception, Section 4(a) is naturally read as a statutory statement of this "prevailing view" that provided only for disparate treatment claims.

a. Section 4(a)(1) applies to employer decisions to fail/refuse to hire an older worker, to discharge an older worker, or to discriminate against an older worker in setting terms of employment. Section 4(a)(2) applies to employer decisions to limit, segregate, or classify employees in a way that deprives an older worker of employment opportunities or that otherwise adversely affects an older worker's employment. But Sections 4(a)(1) and 4(a)(2) make such employer decisions unlawful only if taken "because of" age. This is discriminatory motive language.

A decision made "because of" a particular consideration is a decision made "by reason of" or "on account of" that consideration. *Webster's Third New Int'l Dictionary* 194 (1976). It is a decision that is "based on" or "motivated by" that particular consideration. *See Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388-89 & n.15. Thus, as *Hazen Paper* held, Section 4(a)'s point in prohibiting decisions made "because of" age is both to put the focus on the employer's motivating purpose and to make it clear that the same decision is not unlawful—even if it has the same effect—if it is made for a non-age-based reason. *See Hazen Paper*, 507 U.S. at 609, 610-12; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 281 (1989) (Kennedy, J., dissenting) ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.").

To put the point in familiar judicial terms, Section 4(a) makes it unlawful for an employer to make a decision "at least in part 'because of,' not merely 'in spite of,' its adverse effect upon" older workers. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). It is not enough for a plaintiff to prove that an employer decision had an adverse effect on older workers (or that a different decision would have proven more advantageous for older workers). Rather, "'liability depends on whether the protected trait [*i.e.*, age] . . . actually motivated the employer's decision.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (citations omitted).

b. It has been suggested that, since Section 4(a)(1)'s purpose is to state a broad disparate treatment prohibition, Section 4(a)(2)'s purpose must be to supplement Section 4(a)(1) by stating a disparate impact prohibition. But, as its history makes clear and its language demonstrates, Section 4(a)(2)'s purpose is to provide an employer analog to the similarly worded provision in Section 4(c)(2) that prohibits intentional age discrimination by labor organizations. *See* 29 U.S.C. § 623(c)(2) (it is "unlawful for a labor organization . . . to limit, segregate, or classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . , because of such individual's age"); Michael E. Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 Berkeley J. Emp. & Lab. L. 1, 46-54, 72-73 (2004) (discussing origins of Section 4(a)(2)).

It has also been suggested that the first clause of Section 4(a)(2)—addressing decisions "to limit, segregate, or classify . . . in any way which would . . . adversely affect [an individual's] status as an employee"—makes unjustified adverse effects unlawful without regard to the employer's intent. But the first clause of Section 4(a)(2) standing alone—like the first clause of Section 4(a)(1) standing alone—does not state a liability standard at all. Rather, in each

instance, the first clause merely states one of the two necessary predicates for employer liability by delineating the kinds of adverse decisions to which Section 4(a) applies: In Section 4(a)(1), the listed practices are particular employer decisions which are by their nature adverse to an older worker (*e.g.*, failing or refusing to hire an older worker). And, in Section 4(a)(2), since employer decisions "to limit, segregate, or classify" are not decisions that by their nature are adverse to older workers, the listed practices are such decisions that "adversely affect [an individual's] status as an employee . . . ." In both instances, however, the statute sets a second predicate for liability—*i.e.*, that the employer has made the applicable decision, with its applicable "adverse[] [e]ffect," "because of such individual's age." In short, the first clause of Section 4(a)(2) does nothing to change the discriminatory motive requirement imposed by the "because of" language.

It has been further suggested that Section 4(a)(2)'s "because of" language should be read as a continuation of the "adversely affect" phrase in the preceding clause and that, so read, the section provides for disparate impact claims. But, as this Court has consistently recognized, the normal rule is that a comma between statutory clauses generally requires separating the language on either side. *See, e.g., Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 189 (1995); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). Accordingly, Section 4(a)(2)'s "because of" clause, which is set off by a comma from the first clause, is not properly read to continue the "adversely affect" phrase. Rather, the section's grammatical structure makes it plain that the "because of" clause refers to and modifies the first clause as a whole and thereby sets a discriminatory motive predicate for Section 4(a)(2) liability. *Accord DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 733 (3d Cir. 1995) (op. of Greenberg, J.); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 843 & n.27 (1982).

Finally, it has been suggested that, since Section 4(a)(2)'s "because of" clause is phrased in the singular, it is improper to read the clause as referring to and modifying the first clause as a whole. But the section's first clause is phrased in both the plural (insofar as it refers to an employer decision "to limit, segregate, or classify his employees") and the singular (insofar as it refers only to a decision that "would deprive or tend to deprive any individual of employment opportunities . . . ."). It was therefore grammatically correct to phrase the "because of" clause in the singular, as it makes a claim actionable under Section 4(a)(2) only where the age of an individual (alone or with others) motivated the employer's decision, and the individual (alone or with others) was injured by the decision.

c. This reading of Section 4(a)(2) provides a natural congruence with Section 4(a)(1). Both provisions require that covered employer decisions be decisions made "because of" age in order to be unlawful. Both provisions, in other words, make intentional age discrimination—and only intentional age discrimination—unlawful.

2. The ADEA as a Whole Cuts Against Reading Section 4(a) as Providing for Disparate Impact Claims

Nothing else in the ADEA provides "convincing evidence" that Section 4(a) is to be read to provide for disparate impact claims. To the contrary, the remainder of the statute cuts against reading Section 4(a) as providing for disparate impact claims.

a. The ADEA simply cannot be said to enact a general prohibition on all employer decisions that adversely affect older workers. To the contrary, it only goes so far as to enact a carefully limited disparate treatment prohibition.

As originally enacted, the ADEA did not even apply to all individuals age 40 and over, but protected only those individuals age 40 to age 65. *See* 81 Stat. 602, 607.

Mandatory retirement programs were permissible, *see United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), as was age discrimination under a "bona fide employee benefit plan." *Ohio Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 176-82 (1989). Moreover, while the statute has since been amended to apply to employees age 40 or over, Section 4(a) does not apply to discrimination that favors an older worker over a younger one. *See General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1239 (2004). Furthermore, the ADEA continues to permit mandatory retirement programs for firefighters, executives, and policymakers, *see* 29 U.S.C. §§ 623(j), 631(c), and permits age-based provisions in early retirement plans and benefit plans, *see id.* § 623(f)(2). Also, intentional discrimination is permissible where age is a "bona fide occupational qualification reasonably necessary to the normal operations" of a business. *Id.* § 623(f)(1). In short, the ADEA always has allowed much age-based decisionmaking.

Correlatively, "[t]he statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995). Section 4(f)(3) makes it lawful "to discharge or otherwise discipline an individual for good cause." 29 U.S.C. § 623(f)(3). Section 4(f)(2) makes it lawful "to observe the terms of a bona fide seniority system . . . ." *Id.* § 623(f)(2). And Section 4(f)(1) states that it shall be lawful "to take any action . . . where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1).

These "various exemptions and affirmative defenses . . . illustrat[e] . . . [that] Congress recognized that not all age discrimination in employment is [the] 'arbitrary' [age discrimination]" that Congress determined should be prohibited. *Betts*, 492 U.S. at 176. Such a limited, nuanced scheme—directed only at "arbitrary" age discrimination—cuts

deeply against reading Section 4(a) as providing for disparate impact claims.

b. The "reasonable factors other than age" ("RFOA") provision in Section 4(f)(1) is particularly instructive in this regard. On the one hand, the RFOA provision "makes clear that '[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000) (quoting *Hazen Paper*, 507 U.S. at 611). On the other hand, the RFOA provision "insure[s] that employers [a]re permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983).

While the RFOA provision applies of its own force only where a differentiation is based on "reasonable factors" other than age, determining whether a decision "is based on" such factors is an inquiry that focuses on the employer's motive in making the decision. As petitioners are forced to recognize (Pet. Br. at 24), "[t]he RFOA provision uses language that *does* of necessity connote intentionality." By doing so, however, the RFOA provision confirms that Section 4(a) states only a disparate treatment prohibition.

The fundamental distinction between a disparate treatment liability theory and a disparate impact liability theory is that motive is dispositive in the former and irrelevant in the latter. While evidence of effects (statistical or otherwise) is admissible to prove either kind of claim, the employer's motives are determinative only in a disparate treatment case. In a disparate impact case, in contrast, the dispositive inquiry is whether an employment decision has a significant adverse effect on the protected class and, if so, whether the decision is demonstrably justified. Those are not inquiries into employer motive. Thus, the RFOA provision—by underlining the ADEA's insistence that employer motive is not merely relevant but outcome-determinative—belies the notion that the

ADEA provides for disparate impact claims. Such a motive-based inquiry is wholly inconsistent with a disparate impact regime. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 670 (1989) (Stevens, J., dissenting) ("intent plays no role in the disparate-impact inquiry").

c. Sections 2 and 3 of the ADEA provide added context for Section 4 and do so in a manner that shows that Section 4(a) is only a disparate treatment prohibition.

Section 2(a) finds both that the "setting of arbitrary age limits regardless of potential for job performance has become a common practice," and that "certain otherwise desirable practices may work to the disadvantage of older persons," 29 U.S.C. § 621(a)(2); and it declares that the first of these—"arbitrary discrimination in employment because of age"—"burdens commerce and the free flow of goods," *id.* § 621(a)(4). Section 2(b) follows by stating two purposes of the ADEA: (i) "prohibit[ing] arbitrary age discrimination in employment," and (ii) "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* § 621(b).

Section 3 of the ADEA then addresses both the problem of "otherwise desirable practices [that] may work to the disadvantage of older persons"—including neutral practices with disproportionate adverse effects—and the statutory purpose of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." Section 3 charges the Secretary with undertaking research "with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills," 29 U.S.C. § 622(a)(1); requires the Secretary to publish "the findings of studies and other materials for the promotion of employment" of older workers, *id.* § 622(a)(2), and to foster programs for "expanding the opportunities and potentials of older persons," *see id.* § 622(a)(3); and requires the Secretary to increase educational

opportunities for older workers by "sponsor[ing] and assist[ing] State and community information and educational programs." *Id.* § 622(a)(4). Thus, Section 3 provides for a broad range of non-coercive measures aimed at alleviating, among other things, the adverse effects on older workers of neutral employer practices.

Section 4, in its turn, addresses the separate problem of employer practices that "set[] arbitrary age limits regardless of potential for job performance" and does so by prohibiting "arbitrary age discrimination in employment." Thus, in contrast to Section 3 and the problems of older workers that it addresses, Section 4's sole purpose is to make intentional age discrimination—*i.e.*, disparate adverse treatment of older workers "because of" age—unlawful.

B. The Legislative History Confirms that the ADEA Does Not Recognize Disparate Impact Claims

The legislative history of the ADEA "is a model of lucidity," and it also "drives the reader to the conclusion that 'intent' to discriminate on the basis of age was the gravamen of age discrimination and that actions which have 'adverse effect' on older workers were not to be considered illegal." Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 73.

In passing Title VII, Congress "did not yet have enough information to make a considered judgment about the nature of age discrimination." *EEOC v. Wyoming*, 460 U.S. at 229. Congress therefore directed the Secretary of Labor to study the issue and make "such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 715, 78 Stat. 241, 265 (1964).

In a June 1965 report responding to that directive, the Secretary of Labor discussed "the entire range of factors which tend to have adverse effects on the employment of older workers." J.A. 42. The Secretary found that, unlike race

discrimination, age discrimination is not based upon animus or other "feelings about people entirely unrelated to their ability to do the job." J.A. 37; *see also id.* ("There is *no* significant discrimination of this kind so far as older workers are concerned."). He instead found that "[t]he most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." J.A. 44. This form of discrimination, he noted, is what the 1964 Congress had referred to as "arbitrary discrimination" in employment because of age. J.A. 37.

The Secretary added that the "force of certain circumstances," such as health problems, lower levels of education, and technological changes, "affect older workers more strongly, as a group, than they do younger workers." J.A. 57-66. In this regard, the Secretary noted that certain institutional arrangements such as pension and benefit plans could adversely affect older workers, sometimes by leading employers to refuse to hire older workers. J.A. 38, 66-73. But the "firmest conclusion" from the Secretary's study was that "the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as 'arbitrary' . . . ." J.A. 77-78. The Secretary recommended that institutional arrangements and neutral practices disadvantaging older workers be addressed through pension reforms, J.A. 80-81, counseling, job placement, and job training programs, J.A. 82-85, and a system of continuing education, J.A. 85-89.

On January 23, 1967, the Secretary sent proposed legislation to Congress. Letter from W. Willard Wirtz to Hon. John W. McCormack and Hon. Hubert H. Humphrey, Jan. 23, 1967, *reprinted in* EEOC, *Legislative History of the Age Discrimination in Employment Act* 62-63 (1981) [hereinafter "*EEOC Legislative History*"]. The Secretary stated that, while

the proposed bill "provides for attention to be given to institutional arrangements which work to the disadvantage of older workers," "[r]easonable differentiations not based solely on age . . . would not fall within the proscription" of the legislation. *Id.* Rather, "[r]esearch would be undertaken and promoted with a view to reducing barriers to the employment of older workers." *Id.*

The Secretary explained that his bill addressed only "the 'unjust' or 'arbitrary' . . . discrimination . . . which may be made in the absence of any legitimate relevance between age and employment capacity." *Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 90th Cong. 37 (1967) (internal quotation marks omitted). The Secretary indicated that, where there was "legitimate relevance," even "differentiations or distinctions" involving consideration of age were permitted. *Id.* This limitation was "identified specifically in Section 2(b)" of the bill and "reflected particularly in Section 4(f)," which provided that there was no violation "*where age is a bona fide occupational qualification*" or "*where the differentiation is based on reasonable factors other than age.*" *Id.* at 39 (emphasis in original).

The ADEA is in essence the Secretary's proposed bill. *See EEOC Legislative History* at 173. The findings and purposes in Section 2 were enacted as the Secretary proposed, as were the education and research programs in Section 3, the prohibitions in Section 4(a), and the RFOA provision in Section 4(f)(1). *Compare id.* at 68 *with* 81 Stat. 602-03. Both committee reports acknowledge the Secretary's proposals and rely upon them. *See id.* at 74-76, 106-07.

This legislative history confirms that the ADEA does not provide for disparate impact claims. In making his sweeping inquiry, the Secretary gave detailed consideration to neutral employer practices that have adverse effects on older workers. The Secretary concluded that such practices could *not* properly

be described as "age discrimination" and that only "arbitrary age discrimination" warranted prohibition. The Secretary recommended that other problems facing older workers be dealt with through education, job placement, and training measures. As Congress enacted the very language that the Secretary proposed, there is no basis for inferring that Congress had a different intent. *Accord EEOC v. Wyoming*, 460 U.S. at 230-31.

C. Important Pragmatic Considerations Cut Against Reading the ADEA to Provide for Disparate Impact Claims

Although the text and legislative history of the ADEA are dispositive, important pragmatic reasons also cut against reading the ADEA to provide for disparate impact claims. On an operational level, the ADEA is ill-suited for such claims.

1. In Title VII cases, disparate impact claims have traditionally been tried to courts, not juries. Thus, in 1991, when Congress authorized jury trials under Title VII, it expressly excluded disparate impact claims from that authorization. *See* 42 U.S.C. § 1981a(a)(1) & (c).

In contrast, Section 7(c) of the ADEA specifically provides without any limitation that "a person shall be entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c)(2). Where disparate impact claims have been allowed, those cases have been tried to juries. *See, e.g., Allen v. Entergy Corp.*, 193 F.3d 1010, 1013-15 (8th Cir. 1999); *AFSCME, Dist. Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 354-56 (2d Cir. 1997); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 547 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985).

But, as Title VII's scheme suggests, disparate impact claims do not fit well with a jury trial approach. Factual

questions about discriminatory intent are "typical grist for a jury's judgment." *Teamsters v. Terry*, 494 U.S. 558, 583 (1990) (op. of Stevens, J.). But the complex evaluative judgments made in disparate impact cases—about, *e.g.*, differential rates of selection, validity of selection practices, and effective alternative selection practices—plainly are not. *See* Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. Tol. L. Rev. 1261, 1272 (1983) [hereinafter "Player, *Title VII Transplant*"]; Douglas Herbert & Lani Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. Tex. L. Rev. 625, 652-56 (1996). Moreover, "the jury instructions that they will be given will be difficult, if not impossible, to follow." *Id.* at 657. In short, the "practical abilities and limitations of juries" that could "impair the functioning of [a] legislative scheme" providing for disparate impact claims counsel against recognizing such claims. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (internal quotation marks omitted).

2. Furthermore, in Title VII cases, disparate impact claims are usually pursued as Rule 23(b)(2) class actions. Because such claims challenge practices generally applicable to a group and can be remedied by common equitable relief, Title VII disparate impact cases are the "prime examples" of cases where individualized notice and an opportunity to opt out are neither necessary nor appropriate. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

In contrast, Rule 23(b)(2) does not apply to ADEA claims. Such claims are subject to the "opt-in" procedures established in 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b).

While the ADEA "opt-in" procedures allow older worker plaintiffs to group their resources, they do not allow "representative" actions, much less ones without notice or an opportunity to opt out. *See Hoffmann-La Roche Inc. v.*

Sperling, 493 U.S. 165, 170, 173-74 (1989). Thus, there is no mechanism for ensuring class-wide participation in ADEA disparate impact claims; the courts have no power to bind all affected to common equitable relief; and "repetitive" litigation imposing inconsistent obligations is entirely possible. Player, *Title VII Transplant*, at 1272-73. These procedural differences add to the showing that the ADEA is ill-suited for disparate impact claims.

3. In the ADEA context, there also is no satisfactory calculus for measuring disparate impact. In the Title VII context, race, sex, national origin, and religion are basically dichotomous variables and the effects of a selection practice on blacks versus non-blacks, Hispanics versus non-Hispanics, females versus males, *etc.*, is relatively straightforward to measure. In contrast, "age is a continuum," *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985), and "impact analysis that works well with finite classes like race and sex does not quite fit with a fluid, continuum concept such as age." Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That Is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. Rich. L. Rev. 819, 829 (1997) [hereinafter "Player, *Impact Analysis Under the ADEA*"].

One possible approach would allow plaintiffs to specify the applicable groupings on a case-by-case basis (*e.g.*, workers age 50 and over versus under age 50). But such an approach is subject to manipulation and provides no standards for self-examination and voluntary compliance. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1371-73 (2d Cir. 1989); Player, *Impact Analysis Under the ADEA*, at 829-30. For example, on this approach, "an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'sub-group' of those age 85 and above, even though all those hired were in their late seventies." *Lowe*, 886 F.2d at 1373.

A second, less manipulable approach is to specify the groupings as individuals age 40 and over versus those under age 40. *See Lowe*, 886 F.2d at 1371-73. But this more categorical approach is in tension with this Court's observation that the ADEA "prohibits discrimination on the basis of age and not class membership." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996). Thus, a number of the lower courts have rejected it. *See* Tom Lee *et al.*, *Lindemann & Grossman's Employment Discrimination Law* 447 & n.197 (3d ed. Supp. 2002).

In any event, neither approach solves the problem posed by the transient nature of age. Age is not merely a continuous variable; it is also a changing one. An individual not covered by the ADEA at age 39 becomes protected by the statute the next year; and an individual under age 40 (or age 50 or age 55 or age 60) may age sufficiently to move into a different comparison group over the course of litigation. Thus, "[t]he attempt to define 'aged persons' as all persons over 40 makes sense as an effort to wipe out specific age limits, but not as creating a 'protected class' like race or sex, precisely because of the transient composition of the group." Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 104.

4. Evidence that an employer decision that is neutral on its face has adverse effects on older workers also lacks the probative significance that such evidence has in race and sex discrimination cases. Although it may be idealistic in some ways, *see Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (op. of O'Connor, J.), the working assumption of Title VII law is that, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977). On this assumption, a statistical showing that a neutral employer decision produces

a deviation from the norm is taken as a significant signal that the employer practice is problematic (without evidence of justification). But this assumption has no conceivable application to younger and older workers and, accordingly, "statistics showing a deviation from such a 'norm' would not prove anything in the ADEA context . . . ." Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 110.

As this Court has noted, "physical ability generally declines with age." *Mass. Bd. of Retir. v. Murgia*, 427 U.S. 307, 315 (1976). Furthermore, "mental capacity sometimes diminish[es] with age." *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991). In addition, older persons have less incentive than younger persons to invest in human capital and tend statistically to have more dated and less valuable technological skills and/or education. *See* Richard A. Posner, *Aging and Old Age* 51-58 (1995). And, while age frequently brings with it more experience and wisdom, *see id.* at 105-06, in many occupations and professions, age is negatively correlated with performance and interest. *See, e.g., id.* at 72-78, 115-17, 358-60. Consequently, in contrast to race and gender, "'non-age factors having differential age-specific impacts'" are likely to be "'ubiquitous and inescapable.'" *Cunningham v. Cent. Beverage, Inc.*, 486 F. Supp. 59, 62 (N.D. Tex. 1980) (quoting Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 Yale L.J. 27, 65 (1979)).

As the Secretary of Labor noted (J.A. 68-73), some neutral decisions adversely affect older workers as long-term workers who have gained a more advantageous status than younger, shorter-term workers. For example, "virtually all elements of a standard compensation package are positively correlated with age." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). Thus, salary caps in payroll systems (such as those employed by federal and state governments) adversely affect annual percentage pay increases statistically available for older workers. *See EEOC v. Governor Mifflin*

Sch. Dist., 623 F. Supp. 734, 743 (E.D. Pa. 1985). Moreover, in tough times, across-the-board cuts in, for example, wages and/or vacation leave have adverse effects on older workers. *Finnegan*, 967 F.2d at 1164. And a decision to "close a plant or curtail its operations on the basis of high wage costs" will do so as well. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1214 (7th Cir. 1987) (Easterbrook, J., dissenting).

The facts here illustrate the point. Petitioners complain that officers age 40 and over generally received lower initial percentage pay increases. However, officers age 40 and over were generally in *higher* ranked positions and generally received *higher* salaries both before and after the initial increases. The alleged disparate impact derives from the older workers' prior advantageous status.

In short, it is to be expected that many sound and efficacious work, selection, and compensation practices will have a disproportionate adverse impact on older workers—*e.g.*, in physically demanding jobs and in jobs requiring cutting-edge computer skills. Since such adverse effects are so predictable and yet so unavoidable, it is not appropriate to equate a showing that a facially neutral practice has a disparate impact on older workers with a *prima facie* case of unlawful age discrimination and in effect "force employers to carry the burden of justifying virtually all of their work and selection standards." Player, *Impact Analysis Under the ADEA*, at 830. As Justice Breyer has commented, "there [are] so many rules correlated with age . . . that how could the employer run his business where you are going to have a court second-guessing every single rule that's correlated with age. That's the problem." Tr. of Oral Argument at 17, *Adams v. Florida Power Corp.*, No. 01-584 (U.S. March 20, 2002), *available at* www.supremecourtus.gov/oral_arguments/argument_transcripts/01-584.pdf.

Contrary to petitioners' argument (Pet. Br. at 10 & n.4), that problem is not solved by speculative predictions that, in ADEA cases, employers will more frequently succeed in carrying the burden of justifying their neutral practices. Litigation (involving expensive psychometric studies and testimony) that is not likely to be successful has little or no social utility and should not be encouraged. Further, as petitioners have noted (Pet. 9-10 n.3), "the potential exposure to liability under the ADEA affects employers' decisions in designing their employment policies, meaning that the law's impact cannot be measured in terms of . . . litigated cases alone." Indeed, as a respected industrial psychologist has noted: "In the aggregate, heightened probabilities for excellence are not a function of the validity of any particular selection device. Rather, they are a result of a total situation in which vast numbers of employers are free to experiment with an unlimited number of possible qualitative requirements, discarding those that seem unsatisfactory and replacing them with others that seem more promising, and so on and on, in a continuing, open-ended process." Barbara Lerner, Washington v. Davis: *Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 304-05. Yet, by allowing myriad employment practices that correlate with age to be challenged without more, an ADEA disparate impact regime could only retard this search for excellence and, in the process, force employers to abandon sound selection practices and/or to move toward quotas. *See Wards Cove*, 490 U.S. at 652-53; *Watson*, 487 U.S. at 991-92 (op. of O'Connor, J.).

The sum of the matter is that, while statistical disparities concerning minorities and women may tend to identify potentially problematic employment practices, such statistics are not likely to do so where older workers are concerned, since so many sound employment practices are and always will be adversely correlated with age. It just is neither practical nor constructive to allow a *prima facie* case of age discrimination to be based on correlations that prove so little and that are so

frequent and unavoidable. There certainly is no "convincing evidence" that the ADEA is intended to do so.

II. *GRIGGS* AND ITS PROGENY UNDER TITLE VII DO NOT SUPPORT RECOGNITION OF ADEA DISPARATE IMPACT CLAIMS

As petitioners concede (Pet. 6-7), the majority of circuits to address the issue have held that the ADEA does not recognize disparate impact claims. Echoing the minority view, however, petitioners argue (Pet. Br. at 4-5, 11-17, 22) that Section 4(a)(2) of the ADEA was derived from and is similarly worded to Section 703(a)(2) of Title VII; that *Griggs* and its progeny have construed Title VII to provide for certain race/sex disparate impact claims; and that the ADEA should therefore be construed to provide for older worker disparate impact claims. This argument does not withstand scrutiny.

First, it is plain that the 1967 Congress did not follow Section 703(a)'s language in drafting Section 4(a) in order to provide for ADEA disparate impact claims. As noted above (*supra*, at 7-8), in 1967, the prevailing conception was that anti-discrimination provisions required proof of discriminatory motive; and, as of 1967, the "disparate impact" doctrine had not been formulated by any court, enforcement agency, or even academic literature. The pathbreaking construction of Title VII in *Griggs* to recognize certain disparate impact claims did not issue until 1971. Since this later construction of Section 703(a) was not one that reflected "a well-known meaning at common law or in the law of this country" at the time of the ADEA's enactment, *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911), there is no proper basis for concluding that the 1967 Congress specifically intended to incorporate the disparate impact construction of Title VII into the ADEA.

Second, it is equally plain that the textual similarity of Section 703(a) of Title VII and Section 4(a) of the ADEA does not call for recognition of ADEA disparate impact claims.

While the "presumption of uniform usage" is a venerable principle of construction, that presumption clearly gives way here.

a. As this Court has stated, the "presumption of uniform usage" "is not rigid and readily yields" to other indicia of statutory meaning. *General Dynamics*, 124 S. Ct. at 1245. For example, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). For these reasons, the United States Reports are replete with cases giving similar language in two statutes (and even within the same statute) different meanings.

For example, in *General Dynamics*, in addition to finding that the word "age" has different meanings within different sections of the ADEA, 124 S. Ct. at 1246-47, the Court held that the phrase "because of . . . age" has a different scope than the phrase "because of . . . race . . . [or] sex" in Title VII. *Id.* The Court found that "age" "can be readily understood either as pointing to any number of years lived, or as common shorthand for the longer span and concurrent aches that make youth look good." *Id.* at 1246. In contrast, the Court found that "'[r]ace' and 'sex' are general terms that in every day usage require modifiers to indicate any relatively narrow application." *Id.* at 1247. The Court thus found that cases construing Title VII's prohibitions as applying broadly to distinctions that hurt persons of all races and genders were inappropriate as a guide to construing the ADEA's prohibitions; the Court held that "the prohibition of age

discrimination is readily read more narrowly" to apply only to "distinctions that hurt older people." *Id.*

Similarly, in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-25 (1994), the Court construed the attorney's fee provision of the Copyright Act, 17 U.S.C. § 505, to provide a single standard covering both prevailing plaintiffs and defendants, even though the Court had adopted a dual standard in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), when construing virtually identical language in Title VII. The Court noted that "Congress, in enacting § 505 of the 1976 Copyright Act, could not have been aware of the *Christiansburg* dual standard as *Christiansburg* was not decided until 1978." 510 U.S. at 523 n.9. The Court also noted that *Christiansburg* was based on "policy considerations" and "legislative history" that the Court found "not completely similar" in the Copyright Act. *Id.* at 523, 524. Thus, the Court held that the "argument based on our fee-shifting decisions under the Civil Rights Act must fail." *Id.* at 525 (footnote omitted).

More recently, in *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), the Court construed a provision of the Social Security Act to provide that, in computing Social Security taxes on "wages paid," backpay awards should be attributed to the period during which they were actually paid, even though the Court had previously interpreted a similarly worded provision as attributing backpay, in determining eligibility for Social Security benefits, to the period during which the corresponding wages should have been paid. The Court explained that its holding in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), to the latter effect had been grounded on a "concern that the benefits scheme . . . would be disserved by allowing an employer's wrongdoing" to undermine an employee's eligibility for benefits. *Cleveland Indians*, 532 U.S. at 212. Because "[n]o similar concern underlies the tax provisions," the Court held

that *Nierotko* "does not compel symmetrical construction of the 'wages paid' language." *Id.* at 212, 213.

b. Here, it bears emphasis that Congress chose not to add an age discrimination prohibition to Title VII, but rather enacted a separate and distinct statute from the one construed in *Griggs* and its progeny. Although the ADEA and Title VII have some similar language, they are also distinct in many respects; and all of the factors that caused *General Dynamics*, *Fogerty*, and *Cleveland Indians* to conclude that the presumption of uniform usage must yield are present here as well: Specifically, as even petitioners concede (Pet. Br. at 15-17), the Court has not applied Title VII precedent in ADEA cases where the pertinent language of the two statutes differs; and *General Dynamics* establishes that the pertinent prohibitory language in the ADEA is different and narrower than the analogous but broader prohibitory language in Title VII. Moreover, as in *Fogerty*, the ADEA was enacted before *Griggs* and its progeny were decided and at a time when unjustified disparate impact was not a recognized concept of unlawful discrimination. And, most importantly, as in *Fogerty* and *Cleveland Indians*, the Court here faces prior precedent that, as shown below, rests not so much on the allegedly comparable language but on the different and broader "objectives underlying Congress' enactment of Title VII." *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 n.13 (10th Cir. 1996); *DiBiase*, 48 F.3d at 734 (op. of Greenberg, J.); Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 Wis. L. Rev. 507, 517. Indeed, the differences in legislative objectives in Title VII and the ADEA and in the concerns that each statute addresses are so deep as to preclude a symmetrical construction of the ADEA to accord with the construction of Title VII in *Griggs*.

Contrary to the impression that petitioners seek to convey (Pet. Br. at 4, 8, 11-12, 22), *Griggs* and its progeny did not

derive authorization for disparate impact claims strictly from Title VII's text, much less suggest that Section 703(a) is naturally read to state a disparate impact prohibition. Although *Griggs* quotes the statutory text in a footnote, it does not thereafter discuss or analyze that text. Rather, *Griggs* derives its holding that Title VII provides for certain racial disparate impact claims from "[t]he objective of Congress in the enactment of Title VII . . . to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. While the Court found this objective "plain from the language of the statute," *id.* at 429, it did not state that the authorization for disparate impact claims was derived solely or even primarily from the language. Nor did the progeny of *Griggs*, which confirm that Title VII's objectives played a crucial role in the Court's interpretive analysis. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *Watson*, 487 U.S. at 990-91.

Specifically, *Griggs* held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the *status quo* of prior discriminatory employment practices." 401 U.S. at 430. *Griggs* was concerned that "childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their life." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973). Similarly, in determining to extend disparate impact analysis to gender cases, *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977), the Court was confronted with another class (women) that has been historically subject to invidious discrimination and that could cumulatively suffer from actions based on largely immutable characteristics.

The prohibitions of the ADEA, in contrast, were not enacted to address any such broad concern with cumulative disabilities resulting from historic discrimination. The prohibitions of the ADEA are intended to address the distinct problem of arbitrary age discrimination in employment—a problem that, as the Secretary of Labor reported, is different and more limited than the problem of race and sex discrimination in employment.

Specifically, as this Court has observed, "unlike . . . those who have been discriminated against on the basis of race or national origin," or gender, older persons as a class "have not experienced a 'history of purposeful unequal treatment,' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313; *accord Kimel*, 528 U.S. at 83. Where older workers (who of course were once young) are concerned, the lack of a diploma, test score, or skill "cannot be viewed as a product of lifelong discrimination." Krop, 34 Stan. L. Rev. at 850. Older workers as a class have not been educated in segregated schools, been subject to Jim Crow laws, been relegated to menial support jobs, or been barred from workplaces entirely. Rather, as the Secretary of Labor reported to Congress, for older workers, the issue is usually not the denial of skills or opportunity in the first instance or the cumulation of burdens over a lifetime, but the general (albeit uneven) deterioration of skills and performance with advancing age and the consequential tendency of employers to use age as a proxy for measuring an individual's abilities at a particular point in time. J.A. 37, 42-57.

The Court has indicated that disparate impact claims are also intended to address the "problem of subconscious stereotypes and prejudices . . . that Title VII was enacted to combat." *Watson*, 487 U.S. at 990. But "the kind of 'we-they' thinking that fosters racial, ethnic, and sexual discrimination is unlikely to play a large role in the treatment of the elderly

worker," "because the people who do the hiring and firing are generally as old as the people they hire and fire and are therefore unlikely to mistake those people's vocational abilities." Posner, *supra*, at 320-21. The Secretary thus reported to Congress that "age discrimination rarely was based on the sort of animus motivating some other forms of discrimination," *EEOC v. Wyoming*, 460 U.S. at 231; J.A. 37, 43-44, where prejudices having no relation to employment may cause erroneous judgments. *See Murgia*, 427 U.S. at 313. Rather, the Secretary reported that age discrimination results from generalizations about work abilities that, although statistically true, may not be applicable to particular individuals. J.A. 37, 42-57. Accordingly, as *Hazen Paper* held in the context of the ADEA, "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." 507 U.S. at 611 (emphasis in original).

In short, contrary to petitioners' suggestion (Pet. Br. at 13-14 & n.8), the concerns that led to the enactment of Title VII and that framed the construction of Title VII in *Griggs* are not the concerns that led to the enactment of the ADEA's prohibitions on age discrimination or that the ADEA's prohibitions are aimed at addressing. As this Court recognized in *EEOC v. Wyoming*, 460 U.S. at 230-31, the ADEA addresses a different and more limited form of discrimination than does Title VII; and, accordingly, in cases like *General Dynamics* and *Betts*, the Court has held that the ADEA has a narrower prohibition that serves a more limited purpose. Indeed, as discussed above (*supra*, at 15-18), the Secretary expressly recommended that neutral practices with adverse effects on older workers not be prohibited but rather be addressed by non-coercive governmental measures. The presumption in favor of uniform usage has no proper application in such circumstances and, accordingly, the Court should decline to read Title VII's disparate impact doctrine

into the ADEA. Justice Stevens' comment that "there is sufficient individuality and complexity to [Title VII], and to the regulations promulgated under it, to make it inappropriate simply to transplant [Title VII's] standards . . . into a different statutory scheme having a different history," *Washington v. Davis*, 426 U.S. at 255 (Stevens, J., concurring), is very much to the point here. *Accord Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring) ("there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA").

In all events, as in *General Dynamics*, there is here a further textual difference between the ADEA and Title VII that requires the presumption of uniform usage to yield. As the court below recognized (Pet. App. 17a-18a), the RFOA provision in Section 4(f)(1) is "a clear textual difference between the ADEA and Title VII regarding employer liability—a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate impact claim under Title VII . . . controls the cognizability of a disparate impact claim under the ADEA." The Court's Title VII cases themselves show that *Griggs* and its progeny give way to statutory provisions like the ADEA's RFOA provision.

In its Title VII cases, the Court has said that disparate impact claims will lie only "in some circumstances" (*Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136-37 (1976)), and only "in certain cases" (*Watson*, 487 U.S. at 986-87, 988). The Court, for example, has declined to decide whether such claims lie under Section 703(a)(1), the Title VII provision applicable to employers' *compensation* decisions—which is the type of decision challenged here. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 144-45 (1977). Moreover, noting that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another," the Court has added that "*Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from

such consequences." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 710-11 n.20 (1978) (emphasis in original).

Indeed, the Court has found that *Griggs* does not apply where Title VII as a whole provides only for disparate treatment claims. For example, Section 703(h) of Title VII makes it lawful to "apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate . . . ." 42 U.S.C. § 2000e-2(h). "Under § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 69 (1982).

The Court has likewise suggested that the Bennett Amendment to Title VII, which allows wage differentiations "authorized by the provisions of section 206(d) of title 29," 42 U.S.C. § 2000e-2(h), precludes disparate impact claims for gender-correlated wage disparities. *See County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). And the Court has held that a disparate impact claim by male employees against a gender-neutral pension plan would be barred by 29 U.S.C. § 206(d), which makes lawful compensation disparities based on "any other factor other than sex." *See Manhart*, 435 U.S. at 710-11 n.20.

Like Section 703(h) and 29 U.S.C. § 206(d) in their particular areas of application, Section 4(f)(1) of the ADEA makes intent outcome-determinative and, in its instance, does so on a statute-wide basis. Thus, Section 4(f)(1) provides yet another ground against transferring the *Griggs* disparate impact construction of Title VII into the ADEA.

III. PETITIONERS' ARGUMENT THAT THE ADEA'S TEXT AND LEGISLATIVE PURPOSES INDEPENDENTLY SUPPORT RECOGNITION OF DISPARATE IMPACT CLAIMS IS IN ERROR

Petitioners' fallback from their argument for a symmetrical construction of Title VII and the ADEA is (Pet. Br. at 8-9, 17-29) that an "independent examination" of the ADEA's text and legislative purposes supports recognition of disparate impact claims. Not even the courts that have approved ADEA disparate impact claims have accepted the erroneous arguments that petitioners offer in this regard.

A. The Text of the ADEA Does Not Support Recognition of Disparate Impact Claims

Petitioners advance two principal textual arguments: First, they suggest (Pet. Br. at 19) that the RFOA "provision necessarily implies that it is possible to violate section 4(a) through differentiation based on a factor other than age—that is, without having a discriminatory purpose." Second, they suggest (Pet. Br. at 22) that "the phrase 'because of'—unlike such terms as 'willfully,' or 'purposefully,' or 'knowingly'—does not refer to an actor's state of mind in all (or even most) contexts, including in the ADEA. Rather, it refers to causation." Neither suggestion is sound.

1. Petitioners' RFOA argument proceeds from the premise (Pet. Br. at 17-21) that, unless the RFOA provision is read as a basis for implying that Section 4(a) provides for disparate impact claims, the RFOA provision has no operative meaning and effect. That premise is wrong.

As the courts of appeals have long held, in a disparate treatment case, the RFOA provision confirms that an action is lawful where the employer's explanation is not a "pretext" for intentional discrimination. *See, e.g.*, *Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979); *Crimm v. Missouri Pac. R.R. Co.*, 750 F.2d 703, 712 (8th Cir. 1984); *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983) (*per curiam*); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979); *Bittar v. Air Canada*, 512 F.2d 582, 582-83 (5th Cir. 1975). In this same vein, the courts of appeals have also construed the RFOA provision to provide the ADEA's answer to the question raised by mixed-motive cases; as Judge J. Skelly Wright wrote for the D.C. Circuit in an oft-cited decision:

> Differentiation "because of" age is unlawful, but not differentiation attributable to "reasonable factors other than age." A transgression arises only if age contributed to the employer's action—so that the differential cannot be ascribed to influences "other" than age. If age is what tips the scale in an adverse employment decision, a violation of the Act has occurred. Conversely, if reasonable and lawful factors dictate and support the employer's decision, additional consciousness of age is not itself interdicted by the Act. The courts agree that age need not be the sole factor, or even the most compelling; it simply must be a consideration that made a difference in shaping the outcome.

Cuddy v. Carmen, 694 F.2d 853, 858 n.23 (D.C Cir. 1982) (citations omitted). In short, the RFOA provision has the meaning and effect of "insur[ing] that employers [are] permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33.

That the RFOA provision applies only to actions "otherwise prohibited" by Section 4(a) does not provide a proper basis for construing Section 4(a) as providing for disparate impact claims. The statutory phrase is "otherwise prohibited," not "prohibited," and the word "otherwise" means "in other respects." *Webster's Third New Int'l Dictionary* 1598. Accordingly, the phrase "otherwise prohibited" at most refers to employer decisions that, on their face and without further explanation, could be deemed ADEA violations. The reference, in other words, would be to a traditional "pretext"

case, once the *prima facie* case is made, if the defendant did not show a legitimate non-discriminatory reason for its action. *See Reeves*, 530 U.S. at 142-43. The reference would also be to a mixed-motive case, once the plaintiff showed that an illegitimate factor had actually played a role in the decision, if the defendant did not show that the same decision would have resulted from legitimate considerations. *See Desert Palace, Inc., v. Costa*, 539 U.S. 90, 93 (2003). So, as the courts of appeals have held, in both "pretext" and mixed-motive cases, the RFOA provision confirms that an action "otherwise prohibited" is lawful if the action was nonetheless based on "reasonable factors other than age." No disparate impact claims need be implied. Indeed, the RFOA provision also applies to "any action otherwise prohibited under subsection[] . . . (e)," and subsection (e) covers only actions "based on age," 29 U.S.C. § 623(e), and accordingly, the "otherwise prohibited" language necessarily refers to circumstances where the employer acted with allegedly discriminatory intent.

Nor does the RFOA provision's use of the term "reasonable" fairly suggest that Section 4(a) provides for disparate impact claims. While the term "reasonable" has many usages, one accepted use is to refer to something that is "[a]ccording to reason," *Black's Law Dictionary* 1293 (8th ed. 2004), or "using or showing reason," *Webster's New World Dictionary* 1183 (2d college ed. 1979). That was the usage in equal protection law at the time of the ADEA's enactment. *See, e.g., Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617, 624 (1961) (a "classification having some *reasonable basis* does not offend against the equal protection clause") (emphasis added); *McGowan v. Maryland*, 366 U.S. 420, 428 (1961) (finding no equal protection violation because there was "no indication of the *unreasonableness* of this differentiation") (emphasis added). Not surprisingly, in its disparate treatment and mixed-motive cases, the Court uses the term "reasonable" and analogous modifiers in this same way. *See, e.g., McDonnell Douglas*, 411 U.S. at 802-03 (employer

must offer a "*reasonable* basis" for rejection of applicant) (emphasis added); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (defendant must offer "proof of a justification which is *reasonably related* to the achievement of some legitimate goal") (emphasis added); *Desert Palace*, 539 U.S. at 93 ("legitimate" reasons required); *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 399-400 (1983) ("wholly permissible" or "valid" reasons required). This Court has previously said that such modifiers ordinarily should not be understood to add substantive restrictions beyond the basic requirement of a rational, non-discriminatory intent. *See Hazen Paper*, 507 U.S. at 612. And, in the context of the ADEA, it is clear that the term "reasonable" in the RFOA provision, rather than requiring more than a reasonable grounding for an allegedly rational, non-discriminatory decision, is simply the contrasting antonym to the term "arbitrary" that modifies the concept of "age discrimination" referenced in Section 2 (and the legislative history) and prohibited by Section 4(a). In short, petitioners' protest (Pet. Br. at 9, 19-20) that, unless ADEA disparate impact claims are cognizable, the term "reasonable" in the RFOA provision becomes meaningless surplusage, is wholly without substance.

In any event, the Court has expressed a healthy skepticism about reading major theories of liability into statutes "through negative inferences drawn from . . . provisions of quite limited effect," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 259-62 (1994), and the court below was thus quite right to "decline to infer from the inclusion of the word 'reasonable' that Congress meant to create an implicit background rule that actions resulting in an age-disparate impact are as a general matter proscribed." Pet. App. at 17a. Legislation frequently includes clarifying provisions in order to remove argued ambiguities and reassure skeptics; and the insertion of "technically unnecessary" provisions "out of abundance of caution" is "a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti canutela*)." *Fort Stewart Schools v.*

FLRA, 495 U.S. 641, 646 (1990). So, even if the term "reasonable" or, for that matter, the entire RFOA provision were nothing more than confirmation that employer decisions based on reasonable factors other than age are lawful—like Section 4(f)(3)'s confirmation of the lawful employer authority to "discharge or otherwise discipline an individual for good cause"—that would not be a proper basis for reading Section 4(a) to make disparate impact unlawful. *See Lamie v. United States Trustee*, 124 S. Ct. 1023, 1031 (2004) ("Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute."). Indeed, even on this surplusage hypothesis, the RFOA provision would still "underscore the necessity of determining the employer's motives . . . , an essential element in determining whether the employer violated the federal antidiscrimination law," *McKennon*, 513 U.S. at 360; and, as explained above (*supra*, at 13-14), such a focus on employer motives is wholly incompatible with a disparate impact regime.

2. Petitioners' contention (Pet. Br. at 22-24) that the phrase "because of" in Section 4(a)(2) is a mere "causation" requirement is equally off the mark. This contention contradicts petitioners' argument that language must be given the same meaning in each place that it is used in a statute, as the Court in *Hazen Paper* held that the phrase "because of" in Section 4(a)(1) states a discriminatory intent requirement (and not a mere causation or correlation requirement). *See* 507 U.S. at 609, 610, 612. This contention also contradicts petitioners' argument that Section 4(a)(2) should be read to mirror this Court's construction of Section 703(a)(2) of Title VII, as the Court has held that liability is established under that provision only if a neutral practice *both* caused an adverse impact *and* is not demonstrably justified. *See Wards Cove*, 490 U.S. at 658; *Griggs*, 401 U.S. at 430-31. In all events, to use the late-Justice Brennan's words, "[t]o construe the words 'because of' as colloquial shorthand for "but for causation," as [do

petitioners], is to misunderstand them." *Price Waterhouse*, 490 U.S. at 241 (plurality op.) (footnote omitted).

To begin with, in the context of a statute regulating employer conduct with respect to its employees, it makes no sense to construe the phrase "because of" as a mere causation requirement. *All* adverse employer decisions are by definition caused by the employer. If the "because of" phrase is to place any meaningful limits on the statute's application, it must require something more than just causation.

Moreover, there is no basis for—and no authority cited for—petitioners' assertion (Pet. Br. at 22) that "the phrase 'because of' . . . does not refer to an actor's state of mind in all (or even most) contexts . . . ." As shown above (*supra*, at 7-9), the phrase "because of" is naturally and commonly understood as stating a discriminatory motive (as well as a causation) requirement. *See Hazen Paper*, 507 U.S. at 609-10 ("because of" means that a Section 4(a)(1) "disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in [the employer's decisional] process and had a determinative influence on the outcome").

In any event, contrary to petitioners' suggestion (Pet. Br. at 22-23), construing the "because of" language to state a "causation" test does not establish that the ADEA states a disparate impact prohibition. Under Section 4(a)(2), *age* must be the causative factor. Thus, contrary to petitioners' suggestion (Pet. Br. at 23), if an employee is denied a job based on a physical strength test, the worker's employment prospects have *not* been adversely affected because of age, but rather because of physical weakness. That "physical strength is negatively correlated with age" (Pet. Br. at 23) does not itself make the adverse effect of the test on the older worker "because of" age; as the Court analogously held in *Hazen Paper*, even though years of employment service for pension eligibility is "empirically correlated with age," the two factors are "analytically distinct" and "thus it is incorrect to say that a

decision based on years of service is necessarily 'age based'." 507 U.S. at 608, 611. The same is true for a physical strength requirement (and is even more obviously true for a negative correlation between percentage pay increases and age—a correlation plainly having nothing to do with the aging process itself). Indeed, petitioners' effort to *equate* decreased physical strength with old age is precisely the sort of generalized stereotype that the ADEA was designed to prohibit. In a statute premised on the notion that there is a manifest *difference* between aging and negative physical characteristics sometimes associated with aging, age cannot properly be treated as a synonym for characteristics associated with aging.

Petitioners' argument (Pet. Br. at 23) that, had it intended a discriminatory intent requirement, Congress "could have included words such as 'willful,' 'purposeful,' 'knowing,' 'deliberate,' or malice'" proves nothing. This Court has already held that the phrase "because of" age in Section 4(a)(1) states a discriminatory motive requirement. *See Hazen Paper*, 507 U.S. at 609-12. No alternative words were needed in Section 4(a)(1) to establish an intent requirement, and thus none are needed in Section 4(a)(2). Further, both the ADEA and Title VII use words like "willful" and "malice" to establish the higher standard of intent required for imposition of liquidated and/or punitive damages. *See* 29 U.S.C. § 626(b) ("willful[ness]" requirement for liquidated damages); 42 U.S.C. § 1981a(b)(1) ("malice or . . . reckless indifference" requirement for punitive damages). The "because of" language simply establishes the lesser intent standard for a basic disparate treatment claim. *Accord Hazen Paper*, 507 U.S. at 614-17.

Petitioners' final argument (Pet. Br. at 24)—that the phrase "because of" in (both) Sections 4(a)(1) and 4(a)(2) cannot be a reference to a discriminatory intent requirement, since the phrase "based on" in Section 4(f)(1)'s RFOA provision implicates an intent requirement—is weaker yet.

There is no canon of construction which suggests that synonymous phrases in different passages of a statute cannot have similar meanings. On the contrary, the "plain language" canon counsels that statutory words, including synonyms, be given their ordinary and, if appropriate, comparable meanings. *See, e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, the phrases "because of" and "based on" may both properly connote an intent requirement, and in the ADEA they surely do.

B. Petitioners' Legislative Policy Arguments Are Also Without Merit

Petitioners' legislative policy arguments are no better. Petitioners point out (Pet. Br. at 25) that, like Title VII, the ADEA is directed at "the elimination of discrimination in the workplace." *McKennon*, 513 U.S. at 358. But, as Justice O'Connor has noted, "[w]hile the prima facie case under *McDonnell Douglas* and the statistical showing of imbalance involved in a disparate impact case may both be indicators of discrimination or its 'functional equivalent,' they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting." *Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring). Rather, the evils that Congress sought to eradicate are the particular forms of discrimination that Congress perceived workers to face; and, as explained above (*supra*, at 15-18), Congress perceived that older workers face more limited forms of discrimination than the ones faced by minorities and women—and, for older workers, that does not include the adverse effects of unjustified neutral practices. Petitioners plainly err in suggesting otherwise.

It is true, as petitioners note (Pet. Br. at 25-26), that the ADEA expresses a concern that "certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). It is also true, as petitioners note (Pet. Br. at 26-27), that the Secretary's report identifies a number of these practices—including some neutral practices with adverse

effects. But these truths are of no aid to petitioners: "Issues obviously central to disparate impact were never mentioned in committee hearings, in committee reports, or in discussions on the floor of Congress. . . . In addition, no witness or legislator described an employment practice with a disparate impact and said the act would or should outlaw the practice." Gold, 25 Berkeley J. Emp. & Lab. L. at 40, 72 (footnotes omitted). Rather, as explained above (*supra*, at 15-18), the ADEA addresses these practices and the resulting disadvantages for older workers through non-coercive governmental measures such as education, training, and manpower programs; it is no part of the ADEA's purpose to prohibit neutral practices.

Petitioners suggest (Pet. Br. at 27-28) that reading Section 4(a) to provide for disparate impact claims is necessary to assure that the statute addresses the legislative concern with stereotyping of older workers. But, whereas Title VII was concerned with subconscious stereotypes and prejudices rooted in animus, the ADEA was concerned only with generalizations about older persons' work abilities that, while statistically true, may not be applicable to particular older individuals. *See Hazen Paper*, 507 U.S. at 610-11. This distinct concern is fully addressed by providing for disparate treatment claims. As *Hazen Paper* concluded, "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." *Id.* at 611 (emphasis in original).

Petitioners further err in suggesting (Pet. Br. at 9, 24, 28-29) that disparate impact claims are necessary to "overcom[e] problems of proof raised by purposeful but veiled discrimination" against older workers. The issue here is not whether statistics are admissible as proof in an age discrimination case—they surely are, and such statistical proof will expose any employer practices that have the effect of systematically disadvantaging older workers. *See Teamsters*

v. United States, 431 U.S. at 339-40. To be sure, such statistics will only be admissible as proof going to whether the employer adopted the practice with a discriminatory motive—*i.e.*, to the question whether the decision was "because of," or "in spite of," age. *Feeney*, 442 U.S. at 279. But the proof of impact will be allowed; and there is nothing unjust or untoward in requiring a determination about the motive for it. In *Watson*, the Court said that it is not "appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination." 487 U.S. at 987. Since *Hazen Paper* in turn holds that statistical correlations with age are not sufficient by themselves to establish intentional discrimination under the ADEA, those same insufficient statistical correlations cannot properly establish liability for unintentional discrimination.

Finally, petitioners err in suggesting (Pet. Br. at 27, 29) that disparate impact claims are necessary to protect older workers from thoroughly unjustifiable practices. Petitioners offer no evidence that human resources and labor market pressures are not adequate to deter unreasonable practices with systemic adverse effects on older workers. Nor do petitioners give proper weight to the proposition that "[t]he reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one." *Loeb v. Textron*, 600 F.2d at 1012 n.6. Indeed, petitioners' argument in this regard is actually with the Secretary's conclusion that barring neutral practices with adverse effects on older workers is "futile as public policy, and even contrary to the public interest" (J.A. 78), and that such practices and their effects are better addressed through education, training, and manpower programs. But the 1967 Congress agreed with the Secretary, not with petitioners.

IV. THE COURT SHOULD NOT DEFER TO THE EEOC'S VIEW THAT ADEA DISPARATE IMPACT CLAIMS ARE COGNIZABLE

Throughout their brief, petitioners contend (Pet. Br. at 2-3, 7-9, 11, 13, 24-25, 27-29, 29-36) that, in all events, the Court should defer to the EEOC's view that the ADEA provides for disparate impact claims. But the Solicitor General is not appearing in this case to advocate the adoption of the EEOC's view; and no appellate court has approved ADEA disparate impact claims on the basis of the EEOC's view. Nor should this Court.

First of all, as the court below noted (Pet. App. 10a n.5), the EEOC has not promulgated a regulation—substantive or interpretive—construing the ADEA to provide for disparate impact claims. The interpretive guideline that petitioners cite, 29 C.F.R. § 1625.7(d), is not an interpretation of the prohibitions in Section 4(a). Rather, it is an interpretation of the RFOA provision in Section 4(f)(1) that, as its enacted code heading confirms, defines one "lawful practice[]." And the interpretive guideline does *not* affirmatively construe Section 4(a) to provide for disparate impact claims; instead, it construes Section 4(f)(1) to require a showing of "business necessity" to establish that a practice with "adverse impact" is a "reasonable factor[] other than age." In short, there is no EEOC regulation determining Section 4(a)'s meaning to which the Court could possibly defer. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Savs. Bank*, 510 U.S. 86, 106-09 & n.17 (1993); *see generally SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (agency action may be sustained only on grounds relied upon by agency).

To be sure, the EEOC interpretation appears to rest on the assumption that the ADEA provides for disparate impact

claims. But judicial deference is owed, if at all, only to affirmative acts of interstitial lawmaking by an agency; no judicial deference is owed to apparent assumptions made by an agency in the course of addressing a distinct regulatory issue. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287-89 & n.5 (1978) (although "it is undoubtedly a fair inference that the Administrator thought" its regulation was statutorily authorized as an "emission standard," an "implication" was not sufficient and no deference was owed where the Administrator failed to give the issue "specific attention"); *see also SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *Public Citizen v. HHS*, 332 F.3d 654, 661 (D.C. Cir. 2003).

The EEOC's General Counsel's appellate briefs—arguing that the ADEA does provide for disparate impact claims—do not fill the regulatory vacuum. Agency counsel cannot change what a regulation says or the authority under which a regulation was promulgated. Agency counsel's litigation positions are "hardly tantamount to an administrative interpretation" of the relevant statutory and regulatory provisions. *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). On the contrary, as in *Betts* (where the EEOC attempted in this Court to transfer its invalid "cost-justification" interpretation of the term "subterfuge" in Section 4(f)(2) to the statutory phrase "such as a retirement, pension or insurance plan"), this Court should conclude that the EEOC's litigation positions are "entitled to little, if any, deference." *Betts*, 492 U.S. at 174-75.

Second, there is in all events no merit to the EEOC's view that would warrant judicial deference.

a. Contrary to petitioners' suggestion (Pet. Br. at 2, 5, 8, 33-35), the EEOC's view is "at sharp variance with the

original interpretation" of the ADEA by the DOL. Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 102. The DOL's 1968 interpretive bulletin did not address the scope of Section 4(a) and its prohibitions, much less state that Section 4(a) prohibits facially neutral practices with unjustified disparate impact. *See* 29 C.F.R. §§ 860.103-.104 (1970) (App. 46a-50a). On the contrary, the bulletin addressed the RFOA provision and stated, among other things, that: "Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation" (*id.* § 860.103(b)); "[t]he clear purpose [of the provision] is to insure that age . . . is not a determining factor in making any decision regarding . . . employment of an individual" (*id.* § 860.103(c)); "[t]he reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept" (*id.* § 860.103(d)); and "situations in which an employee test is used . . . will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute" (*id.* § 860.104(b)). This is disparate treatment language.

To be sure, the bulletin provided some objective guides that the DOL indicated would support a "differentiation based on reasonable factors other than age." *Id.* § 860.103. But those guides do not implicitly reflect, much less expressly embrace, that the ADEA provides for disparate impact claims. Rather, as might be expected in a bulletin that attempts to "provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it,'" *id.* § 860.1 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944)), these guides explained what an employer had to do to ensure that no enforcement action was initiated by the DOL to challenge an

employer action allegedly based on a reasonable factor other than age. In other words, as this Court held in construing other provisions of the DOL's interpretive bulletin, these guidelines stated "nothing more than a safe harbor, a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the . . . exemption." *Betts*, 492 U.S. at 172.

For these reasons, a range of commentators have so read the DOL's bulletin and have stated that the original DOL interpretations did *not* embrace the disparate impact doctrine. *See, e.g.*, Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 96; Player, *Title VII Transplant*, at 1273; Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 267, 316 (1995); Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 Empl. Rel. L. J. 437, 447 (1985). Petitioners' contrary argument is in error.

b. The EEOC's change from the DOL's prior course was precipitous and without thorough consideration. The EEOC's guidelines were proposed only months after the EEOC assumed responsibility for enforcing the ADEA, and long before the EEOC had gained any significant experience with the statute. *See* Proposed Interpretations, 44 Fed. Reg. 68,858, 68,861 (1979) (App. 51a-53a). Moreover, although the EEOC has substantive rulemaking authority under the ADEA, the EEOC chose to issue its guidelines only as "interpretive rules or statements of policy" and without complying with the 30-day notice period required for the imposition of substantive rules (through 29 U.S.C. § 628's express incorporation of the Administrative Procedure Act's rulemaking provisions). *See* Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,724 (1981) (App. 54a). Most

importantly, the EEOC issued the pertinent guideline as an interpretation of Section 4(f)(1), not of Section 4(a); did not affirmatively conclude that Section 4(a)(1) provides for disparate impact claims; and, as justification for its construction of Section 4(f)(1), simply cited this Court's decision in *Griggs*, which dealt only with Title VII and says nothing about either Section 4(a) or Section 4(f)(1), and the Sixth Circuit's decision in *Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975), which did not even involve a disparate impact claim. *See* 46 Fed. Reg. at 47,725 (App. 55a). Notably, the EEOC did not even mention—much less analyze—then-Justice Rehnquist's earlier issued opinion dissenting from the denial of *certiorari* in *Markham v. Geller*, 451 U.S. 945, which did address these issues.

c. The EEOC's apparent assumption that the ADEA provides for disparate impact claims is bound up in a regulatory interpretation that is itself legally unreasonable. Specifically, the EEOC regulation equates the RFOA provision with a "business necessity" standard and requires compliance with the Uniform Guidelines for Employee Selection. But those guidelines expressly state that they "do not apply to responsibilities under the Age Discrimination in Employment Act." 29 C.F.R. §§ 1607.1(A), 1607.2(D). Moreover, a "business necessity" exists under those guidelines only if, among other things, a challenged practice is "job related" and no equally effective alternative practice with less adverse impact is available. *See id.* §§ 1607.3(B), 1607.6(A). Yet there is no dictionary definition or legal precedent that even arguably allows the term "reasonable" in the RFOA to be given such a restrictive meaning. Indeed, the clause preceding the RFOA provision in Section 4(f)(1) expressly applies to any "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C.

§ 623(f)(1). As this Court has declared, a standard "of reasonable necessity[] [is] not [one of] reasonableness." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985). In short, the EEOC interpretive regulation on Section 4(f)(1) improperly equated these two distinct standards and is not a legally valid construction of that statutory provision, much less of the meaning of Section 4(a).

d. Most fundamentally, the EEOC interpretation is invalid as contrary to law. Twice before this Court has held that interpretations of the ADEA announced by the EEOC in the 1981 interpretive bulletin went beyond the EEOC's legal authority and thus were not worthy of the Court's deference. *See General Dynamics*, 124 S. Ct. at 1248; *Betts*, 492 U.S. at 171. For the reasons stated throughout this brief, the same is true here.

Finally, petitioners plainly err in suggesting (Pet. Br. at 35-36) that "Congress can fairly be deemed to have acquiesced in the [EEOC's] regulatory construction of the statute." As illustrated by then-Justice Rehnquist's opinion in *Markham*, 451 U.S. at 947-49, the DOJ's briefs opposing recognition of ADEA disparate impact claims, *see, e.g.*, App. 58a-63a, reprinting Brief for Appellant, *Arnold v. Postmaster Gen.*, Nos. 87-5361 & 87-5362, at 16-20 (D.C. Cir. March 10, 1988), and the substantial circuit split that exists on the issue, there has never been an administrative and judicial consensus in which Congress could have acquiesced. *See Fogerty*, 510 U.S. at 532. But, in all events, in order to acquiesce in or ratify any such position, Congress would have at least had to "reenact" or "amend" the pertinent substantive provisions of the ADEA. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Congress has not done so, and amendment of other statutory provisions—even related ones—is not legally sufficient. *See, e.g., Betts*, 492 U.S. at 168. Because Congress may legislate

only through bills passed by both Houses and presented to the President, legislative acquiescence may not be found in the mere failure of Congress to disapprove the assumption about disparate impact claims arguably made in the EEOC's 1981 guidelines and later argued in court by the EEOC's lawyers. *See Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 186 (1994); *Landgraf*, 511 U.S. at 264.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 2004

CONTENTS

Page

Report of Mary Dunn Baker, Ph.D. (R. 462-66) 1a

Exhibit 2 (R. 478) 5a
Exhibit 3 (R. 479) 6a

Report of James E. Pearce, Ph.D. (R. 494-99) 7a

29 U.S.C. §§ 621-634 ..... 15a

29 C.F.R. § 860 (1970) (excerpts) 46a

44 Fed. Reg. 68,858 (Nov. 30, 1979) (excerpts) 51a

46 Fed. Reg. 47,724 (Sept. 29, 1981) (excerpts) 54a

Brief for Appellant, *Arnold v. Postmaster General*, Nos. 87-5361 & 87-5362, at 16-20 (D.C. Cir. March 20, 1988) 58a

REPORT OF MARY DUNN BAKER, Ph.D.

AZEL P. SMITH, et. al., vs. CITY OF JACKSON, MISSISSIPPI POLICE DEPARTMENT

In The United States District Court
Southern District of Mississippi
Jackson Division

Civil Action No. 3:01CV367BN

Economic Research Services
Tallahassee, Florida
April 5, 2002

I. INTRODUCTION

At the request of Counsel for the City of Jackson, Mississippi, Economic Research Services (ERS) was asked to review and critique Dr. Marcelo Eduardo's March 11, 2002 Expert Report. In addition, I was asked to prepare analyses to determine whether the data provide support for Plaintiffs' claim that Jackson Police Department (JPD) sworn officers in the protected age group (age 40 and older) were adversely impacted by the transition to the revised pay plan implemented in March 1999.

I am a labor economist with extensive experience in statistical analyses of employment practices and in the computation of economic loss estimates. I completed the Ph.D. in Economics at Florida State University in 1986. Since July, 1986 I have been employed by ERS in Tallahassee, Florida. ERS is a research and consulting firm whose professionals work with individuals, government agencies, colleges and universities, corporations and other organizations to analyze employment decision-making processes and to compute estimates of the value of alleged economic losses. I have testified in federal courts and other judicial settings about statistical analyses and economic loss estimates that I have prepared on behalf of both plaintiffs and defendants. For the

last several years, I, along with other ERS Ph.D. economists, have presented seminars on the economics and statistics of employment discrimination and the computation of the value of losses resulting from a variety of events and actions (e.g., wrongful termination). I have been invited by organizations such as the Florida Bar Association and the American Association of Affirmative Action to give lectures and conduct workshops on statistical analyses of employment issues and the valuation of economic losses. An outline of my credentials and the cases in which I have given testimony is provided at Exhibit 1.

II. DATA AND DOCUMENTS

In addition to Dr. Eduardo's March 11, 2002 report, I relied upon the following data and documents to prepare this report.

- Plaintiffs' Complaint;
- City of Jackson Performance Pay Plan, October 1, 1998;
- City of Jackson Pay Plan Revision, Sworn Police, January 19, 1999;
- Jackson Police Department Salaries as of 1-2-1999 which provides the name, rank, hire date, adjusted hire date and base salary for the Department's sworn officers;
- A document titled Implementation Dates, Police Department, 03/01/99 which provides the name, rank, step and pay rate as of that date;
- Payroll Information, Sworn Police and Dispatchers For 1999 that includes the name, rank, and date of birth, among other items for each officer; and
- Payroll information for sworn officers as of July 1, 1998 that includes the name, rank, and monthly pay rate, among other items for each officer.

III. ANALYSIS

Dr. Eduardo conducted two tests (80% Rule test and Z test) to determine whether the officers in the protected and unprotected age groups were similarly likely to receive double-digit (10% or larger) pay increases in March 1999. His analyses show that older officers were less likely than younger officers to receive double-digit pay increases. Based on the results of these analyses, he concluded that the transition to the new pay plan adversely impacted older officers. As discussed below, it is my opinion that Dr. Eduardo's results are misleading because his analyses assume that the ratio of ½/1999 pay and market pay was similar for older and younger officers. As demonstrated below, this is not the case.

Further, Dr. Eduardo analyzed the percentage increase in pay rates as of March 1, 1999, when the actual transition to the revised pay plan began in October 1998. Since the transition to the March 1, 1999 pay rates was a two-stage process, he should have analyzed the percentage increase in pay rates from the beginning of the transition through the March 1, 1999 increase in pay rates.[1]

According to the Performance Pay Plan, the purpose of implementing the new pay plan was, among other goals, to "attract and retain qualified people" and "maintain competitiveness with other public sector agencies." Exhibit 2 shows the March 1, 1999 semi-monthly pay rates for JPD sworn officers at each rank and step. It is my understanding that these rates were consistent with external market rates of pay.[2]

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[1] It is my understanding that the July 1, 1998 salaries were in effect at the beginning of the transition to the new pay plan.

[2] I have not conducted any studies to determine how the new pay plan rates compare to external market salaries.

According to the data provided, as of March 1, 1999, all officers assigned to a given rank/step were paid the market salary for that rank/step. Exhibit 3 provides a comparison of the average 7/1/1998 salary and the 3/1/1999 market rate for each rank and step.[3] As Exhibit 3 shows, on average, generally the difference between the 7/1/1998 and the market rates was smaller for the higher ranks than the lower ranks. This indicates that, prior to the implementation of the new pay plan, officers in the higher ranks were less underpaid, relative to the market, than officers in the lower ranks. Consequently, to reach the market level, the requisite pay increase was smaller for higher ranks than lower ranks.

Exhibit 3 provides the average age of officers and the percent of officers who were at least age 40 at each rank/step. As Exhibit 3 illustrates, on average, officers in the higher ranks are older than those in lower ranks. Since higher rank officers are older, on average, than lower rank officers and higher rank officers were less underpaid (relative to the market) than lower rank officers, older officers received smaller percentage changes in pay than their younger counterparts. Hence, the data indicate that older officers received smaller raises than their younger counterparts, not because of their age, but because their 7/1/1998 salaries were closer to market rates than were the salaries of their younger counterparts. As Exhibit 4 shows, younger and older officers with the same rank/step and 7/1/1998 pay rate received the same pay increases on 3/1/1999.

/s/ Mary Dunn Baker — April 5, 2002

Name — Date

[3] Exhibit 3 excludes officers who had a change in job between 7/1/1998 and 3/1/1999 because they received other salary adjustments, as well as market adjustments. There is little difference in the figures shown on Exhibit 3 when officers who had a change in job are included.

Exhibit 2

March 1, 1999 Pay Rates by Rank/Step

Jackson Police Department
Sworn Officers

Rank	Step	Semi-Monthly Pay Rate March 1999	Total Number of Officers	Number Under Age 40	Number of Non-Plaintiffs Age 40 and Older	Number of Plaintiffs
Police Officer	Step 1	$1,103.63	103	95	8	0
	Step 1.5	$1,131.21	93	87	6	0
Master Police Officer	Step 1.5	$1,357.46	69	12	37	20
	Step 2.5	$1,426.17	2	0	1	1
	Step 3	$1,461.83	3	0	1	2
	Step 3.5	$1,498.38	1	0	0	1
	Step 4	$1,535.83	3	0	3	0
Police Sergeant	Step 1.5	$1,628.96	2	0	2	0
	Step 2	$1,669.67	32	5	26	1
	Step 2.5	$1,711.42	1	0	1	0
Police Lieutenant	Step 2	$1,878.42	3	0	2	1
	Step 3	$1,973.50	1	0	1	0
Deputy Police Chief	Step 1.5	$2,217.42	1	0	1	0

Source: Data provided by Jackson Police Department.

Note: These data do not include employees who changed jobs between 7/1/98 and 3/1/99. Plaintiff Haymer is not included in the number of plaintiffs because he was promoted from Police Officer to Master Police Officer.

Exhibit 3

Average Pay Rates and Age by Rank/Step

Jackson Police Department
Sworn Officers

Rank	Step	Number of Employees	7/1/98 Average Pay Rate	3/1/99 Average Pay Rate	Dollar Difference Between 7/1/98 and 3/1/99 Average Pay Rates	Percentage Difference Between 7/1/98 and 3/1/99 Average Pay Rates	Average Age	Percent Age 40 and Older
Police Officer	Step 1	103	$893.01	$1,103.63	$210.62	23.59%	32.0	7.77%
	Step 1.5	93	$930.72	$1,131.21	$200.49	21.54%	33.7	6.45%
Master Police Officer	Step 1.5	69	$1,091.24	$1,357.46	$266.22	24.40%	44.1	82.61%
	Step 2.5	2	$1,260.00	$1,426.17	$166.17	13.19%	46.4	100.00%
	Step 3	3	$1,294.62	$1,461.83	$167.21	12.92%	52.2	100.00%
	Step 3.5	1	$1,306.15	$1,498.38	$192.23	14.72%	48.7	100.00%
	Step 4	3	$1,365.38	$1,535.83	$170.45	12.48%	54.1	100.00%
Police Sergeant	Step 1.5	2	$1,466.77	$1,628.96	$162.19	11.06%	44.0	100.00%
	Step 2	32	$1,506.92	$1,669.67	$162.75	10.80%	45.2	84.38%
	Step 2.5	1	$1,511.08	$1,711.42	$200.34	13.26%	53.9	100.00%
Police Lieutenant	Step 2	3	$1,668.00	$1,878.42	$210.42	12.62%	55.9	100.00%
	Step 3	1	$1,758.46	$1,973.50	$215.04	12.23%	49.0	100.00%
Deputy Police Chief	Step 1.5	1	$1,962.00	$2,217.42	$255.42	13.02%	50.6	100.00%

Source: Data provided by Jackson Police Department.

Note: These data do not include employees who changed jobs between 7/1/98 and 3/1/99.

REPORT OF JAMES E. PEARCE, Ph.D.

AZEL P. SMITH, et al., vs. CITY OF JACKSON, MISSISSIPPI POLICE DEPARTMENT

In the United States District Court
Southern District of Mississippi
Jackson Division

Civil Action No. 3:01CV367BN

Welch Consulting
College Station, TX
April 5, 2002

Qualifications.

I am a Senior Economist at Welch Consulting, a firm specializing in economic and statistical research. I received training in economics and statistics at the University of California at Los Angeles, where I earned a Ph.D. in economics in 1980. Prior to joining Welch Consulting I was Vice President and Director of Research at the Federal Home Loan Bank of Atlanta. I have also served as Vice President and Associate Director of Research at the Federal Reserve Bank of Dallas, and I have taught economics and finance at Southern Methodist University and the Georgia Institute of Technology. I have also served as a consultant for the Department of Housing and Urban Development and for Freddie Mac. My resume is attached as Exhibit 1 and a list of my prior testimony is attached as Exhibit 2. My hourly rate is $275.

Assignment

Beginning in October 1998 the city of Jackson, Mississippi implemented a new compensation and appraisal system for city employees, including police officers. In the transition from the former system to the new one, all police officers received a one-time pay increase of 2.0% or more. Plaintiffs' claim that the implementation had a disparate impact on older

officers in that increases granted to officers age 40 and older were, on average, smaller than the increases granted to officers under age 40. Counsel for the City of Jackson has asked that I evaluate the business justification underlying the implementation of the new pay plan.

In the course of my review I have relied on the following documents:

- The Plaintiffs' complaint;
- City of Jackson, Performance Pay Plan (October 1, 1998);
- City of Jackson, Police/Fire Pay Plan Revision (March 1, 1999);
- All City of Jackson Full Time Employees, Joyce Scott (July 8, 1998) (Printed copy of spreadsheet with Employee Number, Name, Range, Title, Current Salary, and other information on Jackson employees);
- City of Jackson Performance Pay Plan, Semi-Monthly Rates-Police Ranks, March 1,1999;
- City of Jackson, Salary Survey Results, Southeastern Region (June 26, 1998);
- *Dramatically Reducing Crime in Jackson, Mississippi: A Plan of Action for the Jackson Police Department* (May 27, 1999);
- Electronic copy of spreadsheet from Mary Baker containing hire date and semi-monthly pay rates for police officers as of ½/99 and 3/1/99;
- Discussions with Ms. Marilyn Hetrick, former Deputy Personnel Management Director for the City of Jackson.

Background

In the late 1990s the city of Jackson, Mississippi developed programs to address two issues of concern to the citizens and leadership of the community. One issue was a relatively high

crime rate and an understaffed police force. Another was a pay system for city employees that was viewed as a handicap in attracting, retaining, and motivating city employees, including police officers and fire fighters. The system did not include formal performance appraisals, scheduled pay increases, or a linkage of pay increases to measured performance.

The city reformed its system for setting pay rates for its civilian, police, and fire employees in 1998 and 1999. The new system included regular performance appraisals, pay ranges with nine pay rates (or "steps"), and regularly scheduled pay increases tied to performance ratings. The city also adopted a program to reform its police department, as described in *Dramatically Reducing Crime in Jackson, Mississippi: A Plan of Action for the Jackson Police Department,* produced by the Linder/Maple Group of New York. The reform of the pay system for police was an important component of the program to make the police department more effective.

Pay Increases at Implementation of the New Compensation Program

Table 1 shows the age distribution of officers in the major police ranks just prior to the beginning of the implementation of the new pay system. The largest number of officers was in the lowest rank, Police Officer. Over 90% of the officers in this rank are under age 40. The next rank, Master Police Officer, includes a mixture of younger and older officers, with about 25% under age 40. In ranks above Master Police Officer, a high percentage of officers are 40 and over.

Table 1

Age Distribution of Police Ranks, July 1998

Rank	Officers	Age <40	Age 40+
Police Officer	207	91.7%	8.3%
Master Police Officer	87	19.5%	80.5%
Police Sergeant	42	17.1%	83.3%
Police Lieutenant	7	0.0%	100.0%

The implementation of the new system involved two steps: (1) Setting the new ranges and (2) positioning the pay rates of incumbent officers in the new ranges. The minimums of the new ranges were set on the basis of a survey of comparable communities in the Southeast. Locating officers' pay rates within the new ranges was determined by a simple rule: each officer's pay rate was set at the bottom of the range (Step 1) or the next highest point (Step 1.5), depending on the officer's seniority. If the resulting pay rate was not at least 2% above the pre-implementation pay rate, the officer's pay rate was moved to the lowest point in the range that would provide a 2% pay increase.

The minimums of the old and new ranges are shown in Table 2. The table indicates that the bottom of the range for the Police Officer rank, which has the highest percentage of younger officers, was shifted upward by 20%, while the other ranges were shifted up by larger amounts. Thus, the range containing the most of the officers under age 40 was shifted upward by a smaller amount than the ranges in which 75% or more of the officers were 40 or older.

Table 2

Range Minimums Under Former and Revised Systems

(Semi-Monthly Rates)

Rank	Former	Revised	Increase
Police Officer	$924	$1,104	19.5%
Master Police Officer	$1,020	$1,324	29.8%
Police Sergeant	$1,228	$1,589	29.4%
Police Lieutenant	$1,424	$1,788	25.6%

The relationships between pre-implementation pay rates and the minimums of the new ranges are shown in Table 3. The average pre-reform pay rate for the Police Officer rank was 10% below the new minimum, while the averages for the Sergeant and Lieutenant ranks were slightly above the new minimum. For these ranks the average pay rates were unrelated to age or seniority. The average pre-reform pay rate for the Master Policeman rank increased with age, but for each age group the average was below the new minimum (Table 4). The implication of Tables 3 and 4 is that pre-reform pay rates for officers under age 40 were much more likely to below the minimums of the new ranges by 10% or more than were the pre-reform pay rates for officers 40 and older.

Table 3 Pre-Reform Average Pay Rates and Minimums of New Pay Ranges			
Rank	**New Minimum**	**Pre-Reform Average Pay**	**Average Relative to New Minimum**
Police Officer	1,104	991	-10.2%
Master Police Officer	1,324	1207	-8.8%
Police Sergeant	1,589	1640	3.2%
Police Lieutenant	1,788	1828	2.2%

Table 4 Master Police Officer Pre-Reform Pay Rates			
	Age Group		
	<40	**40-44**	**45+**
Average Pre-Reform Pay Rate	$1,105	$1,175	$1,286
Average Relative to New Minimum	-16.5%	-11.4%	-2.9%
Number of Master Police Officers	17	34	36

Under the procedure for setting initial pay rates under the new system, the fact that pre-implementation pay rates for officers under age 40 were more likely to be below the minimum of the relevant range by 10% would likely result in larger average increases for officers under age 40.

Implementation Alternatives

The prospect that average pay increases at implementation would differ by age could have been moderated by changing some of the parameters of the new system. However, any

changes that would have had that effect would have sacrificed important objectives of the reform or increased city payroll expense. One possible approach would have been to shift all the salary ranges up by smaller amounts than those shown in Table 2. This would have reduced the increases for most officers under age 40 without impacting the increases for most officers 40 and older. However, this alternative would have compromised the city's efforts to increase the size and quality of the police force, an unattractive alternative given the city's high crime rate and low ratio of officers to population.

Another possibility would have been to move the salaries of senior officers to higher points in the new salary ranges. This alternative would have required additional money, and it would have undercut the plan to make advancement through the new ranges contingent on continued satisfactory performance. Furthermore, the city's procedure in this matter was somewhat more generous to older, more senior employees than the procedure typically followed by other employers in similar circumstances. I have ten years' experience in analyzing pay histories of workforces involved in litigation, and these histories frequently include adjustments to salary ranges–sometimes for individual jobs and sometimes for many positions at once. In my experience employers generally limit pay adjustments associated with increases in salary ranges to bringing below-range salaries up to the new minimum.[1]

[1] Plaintiffs' complaint implies that Jackson had made a practice of relating pay increases to seniority. However, Ms. Hetrick indicated that this was not the case, and my review of the data shows no relationship between pay prior to implementation and seniority for any rank other than Master Policeman. Thus, there does not seem to be any basis for the officers to expect that those with more seniority would receive larger increases at implementation.

Conclusion

In my opinion, the city of Jackson, Mississippi could not have eliminated the likely age difference in pay increases granted on implementation of the new compensation system in 1998 and 1999 without compromising key city objectives or substantially increasing city expenditures. This opinion is based on the information available to me at this time and the review I have conducted to date. I may need to supplement this report if I receive additional information or have the opportunity to conduct a further review of the material I have.

/s/

James E. Pearce, Ph.D.

April 5, 2002

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures--

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise

adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this

paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event

that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv)If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A)paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary

retirement that are reduced or eliminated on the basis of age, if--

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include--

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power--

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and

to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective

defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not

be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any

or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however*, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter--

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking

to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2- year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not

contribute and under which no rollover contributions are made.

§ 632. Omitted

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out

its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal

or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age

Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

* * *

29 C.F.R. § 860 (1970):

§ 860.1 Purpose of this Part.

This part is intended to provide an interpretative bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (Skidmore v. Swift & Co., 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect.

[33 F.R. 9172, June 21, 1968]

* * *

§ 860.103 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age; * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agent or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age:

(1) (i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: *Provided, however,* That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors

such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, whereas another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do not have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as

a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation — an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

[33 F.R. 9173, June 21, 1968]

§ 860.104 Differentiations based on reasonable factors other than age — Additional examples.

(a) *Employment of Social Security recipients.* (1) It is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits. Such a specification could result in discrimination against other individuals within the age group covered by the Act willing to work under the wages and other conditions of employment involved, even though those wages and conditions may be peculiarly attractive to Social Security recipients. Similarly, the specification of Social Security recipients cannot be used as a convenient reference to persons of sufficient age to be eligible for old age benefits. Thus, where two persons apply for a job, one age 56, and the other age 62 and receiving Social Security benefits, the employer may not lawfully give preference in hiring to the older individual solely because he is receiving such benefits.

(2) Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's

condition as to the number or schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

(b) *Employee testing*. The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated. A vital factor in employee testing as it relates to the 40-65-age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and, consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling. Therefore, situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute.

(c) *Refusal to hire relatives of current employee*. There is no provision in the Act which would prohibit an employer, employment agency, or labor organization from refusing to hire individuals within the protected age group not because of their age but because they are relatives of persons already employed by the firm or organization involved. Such a differentiation would appear to be based on "reasonable factors other than age."

[34 F.R. 322, Jan. 9, 1969, as amended at 34 F.R. 9709, June 21, 1969]

44 Fed. Reg. 68,858 (Nov. 30, 1979):

29 C.F.R. Part 1625

Proposed Interpretations; Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission

ACTION: Proposed Interpretations.

SUMMARY: On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978) responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, (ADEA) as amended, 29 U.S.C. 621, 623, 625, 626-633 and 634 was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The Commission assumed enforcement of the ADEA on that date. The Commission proposes to adopt, except as modified herein, certain of the interpretations of the Department of Labor with respect to the enforcement of the Age Discrimination in Employment Act of 1967, as amended. The Department's interpretations currently appear at 29 CFR Part 860.

The age discrimination interpretations of the Department of Labor, issued in 1968 and amended several times thereafter, have been revised to reflect the statutory changes made in 1974 and 1978 as well as to reflect both the impact of judicial decisions and the past experience of the Department of Labor and the Commission. It is the Commission's position that these proposed interpretations be interpreted in a manner which is consistent with Title VII of the Civil Rights Act of 1964. The Commission has deleted many of the examples contained in the Department of Labor Interpretations. In some instances the deletions were made for stylistic purposes while in other instances examples were deleted because they were inconsistent with current law or because the Commission needed to accumulate expertise in certain areas.

* * *

1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) A factor, upon which a differentiation is based, is not a valid defense, however, if age discrimination comprises any element of the employment decision adverse to the applicant or employee, either expressly or by implication.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the ground that it is a "factor other than age," and such a practice has an adverse impact on persons in the protected age group and cannot be shown to be related to job performance, such a practice is unlawful. A vital factor in employee testing as it relates to the 40-70 age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older

applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling.

(e) The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the Section 4(f)(2) exception of the Act. (See also § 1625.10)

* * *

46 Fed. Reg. 47,724 (Sept. 29, 1981):

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 C.F.R. Part 1625

Final Interpretations: Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Interpretations; Rescission of Interpretations.

EFFECTIVE DATE: Since the following final agency interpretations are interpretative rules or statements of policy, the 30-day delay in effective date as prescribed in section 553(d) of Title 5 U.S. Code does not apply. Accordingly, these interpretations are effective upon September 29, 1981.

FOR FURTHER INFORMATION CONTACT: John Pagano, Office of the General Counsel, Legal Counsel Division, Equal Employment Opportunity Commission, 2401 E Street, NW, Room 2254, Washington, D.C. 20506, telephone 202-634-6595.

* * *

§1625.7 Differentiations based on reasonable factors other than age.

The Commission received numerous comments on this section and has decided to modify paragraphs (c), (d), and (e) of this section to clarify its position regarding the section 4(f)(1) exception of a reasonable factor other than age.

Paragraph (c) has been rewritten to illustrate that where an employment practice uses age as a limiting criterion, the defense that the practice is justified by the section 4(f)(1) exception of a reasonable factor other than age is unavailable. *See Marshall v. Goodyear Tire & Rubber Co.*, 19 EPD ¶8973

[W.D. Tenn. 1979]. Considerable confusion was generated on the proposed section from the apparent misunderstanding that, as originally written, it applied to the employer's burden of rebutting the *prima facie* case. That was incorrect. The section refers to the use of the Section 4(f)(1) defense of "a reasonable factor other then age," and has been clarified to indicate when that defense is unavailable. c.f. *City of Los Angeles, Department of Water and Power, et al. v. Manhart*, 435 U.S. 702, 712-13 (1978).

Paragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity. *See Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The final interpretation also contains a reference to the Commission's Guidelines on Employee Selection Procedures, 29 CFR Part 1607.

Paragraph (e) of 1625.7 has been modified to clarify its initial intent that when the defense of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

* * *

Signed at Washington, D.C., this 18th day of September 1981.

For the Commission,
J. Clay Smith, Jr.,
Acting Chair, Equal Opportunity Commission

* * *

1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that

* * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at part 1607 of this Title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to

employee benefit plans which qualify for the section 4(f)(2) exception to the Act.

* * *

CASE SCHEDULED FOR ORAL ARGUMENT ON MAY 17, 1988

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5361 & 87-5362

CLYDE J. ARNOLD, JR., *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

CHARLES R. NETHERTON, *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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C.A. Nos. 85-2571 & 86-2291

ARGUMENT

I. The District Court Erred In Applying Disparate Impact Analysis In An ADEA Case

The District Court erred as a matter of law in ruling that the disparate impact theory developed in the Title VII context is applicable to the ADEA. 649 F. Supp. at 676. The Supreme Court has never approved such an extension of the effects test to age discrimination cases (*see Geller v. Markham*, 451 U.S. 945, 947-48 (1981) (Rehnquist, J., dissenting from the denial of certiorari)), and neither the language nor the purpose of the ADEA supports such an interpretation. Although several courts of appeals have applied disparate impact analysis in ADEA cases,[1] this Court has not done so and should not do so in this case.[2]

[1] *See Holt v. The Greenwald Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Monroe v. United Air Lines, Inc.*, 736 F. 2d 394, 404 n.3 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Heward v. Western Electric Co.*, 35 FEP Cases 807, 810 (10th Cir. 1984); The Fifth Circuit has expressly left the question open. *Adkins v. South Central Bell Telephone Co.*, 744 F.2d 1133, 1136 (5th Cir. 1984); *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 643 n.13 (5th Cir. 1985). Decisions in the Third and Eleventh Circuits discuss disparate impact analysis in the context of ADEA actions but have not applied it. *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 372 (3rd Cir. 1987); *Allison v. Western Union*, 680 F.2d 1318, 1321-22 (11th Cir. 1982).

[2] Two ADEA decisions of this Court have made reference to disparate impact analysis. *Schmid v. Frosch*, 680 F.2d 248, 250-51 (D.C. Cir. 1982); *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). However, both cases were analyzed and decided under disparate treatment analysis, and neither addressed the question of whether disparate impact analysis should be applied under the ADEA.

Section 4(f)(1) of the ADEA provides that it "shall not be unlawful for an employer . . . to take action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).[3] A similar defense is found in the Equal Pay Act,[4] but not in Title VII. The Supreme Court has stated that the presence of this defense in the Equal Pay Act distinguishes that statute from Title VII and would preclude the application of the effects test in Equal Pay Act cases:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." . . . The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination . . . . Equal Pay Act litigation therefore has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on bona fide use of "other factors other than sex."

Washington County v. Gunther, 452 U.S. 161, 170 (1981) (citations and footnotes omitted); *see also Los Angeles v.*

[3] While section 4(f)(1) is not directly applicable to federal employees (*see* 29 U.S.C. § 633a(f)), this Court has nonetheless looked to it in delineating the burdens of proof in federal sector ADEA cases (*Schmid v. Frosch*, 680 F.2d 248, 250 n.7 (D.C. Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 858 n.23 (D.C. Cir. 1982)), and has held that the same substantive standards should be applied for establishing a violation of the ADEA in federal as in private sector cases (*Id.* at 856). Of course, it would have been very odd for Congress to have intended to curtail disparate impact analysis in private, but not federal, employment.

[4] The Equal Pay Act allows "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

Manhart, 435 U.S. 702, 710-11 n.20, 713 n.24 (1978); *Geller, supra*, 451 U.S. at 949 (Rehnquist, J., dissenting).

As Judge Easterbrook argues in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), the "reasonable factors other than age" defense in the ADEA "impl[ies] strongly that the employer may use a ground of decision that is not age, even if it varies with age . . . . 'The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact.'" *Id.* at 1220 (Easterbrook, J., dissenting) (citation omitted).[5]

Moreover, the policy considerations underlying the use of disparate impact analysis in Title VII cases are simply not present in age discrimination cases. In *Griggs v. Duke Power Company*, 401 U.S. at 424, 429-30 (1971), the seminal case for disparate impact analysis under Title VII, the Supreme Court held that Title VII was enacted "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Accordingly, facially neutral practices that "operate to 'freeze' the status quo of prior discriminatory employment practices" were deemed to be prohibited unless job related. *Id.* at 430. In reaching this conclusion, the Court emphasized the inferior, segregated educational opportunities available to blacks, as well as prior discrimination in employment. *Id.*

[5] *Accord* Blumrosen, *Interpreting the ADEA: Intent or Impact in the Age Discrimination in Employment Act* (1982); Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Prob. 53 (Aut. 1986); Stacy, *A Case Against Extending the Adverse Impact Doctrine to the ADEA*, 10 Empl. Rel L.J. 437 (1985); Callile, *Three Developing Issues of the Federal Age Discrimination in Employment Act of 1967*, 54 Det. J. Urb. L. 431 (1977).

This need to avoid perpetuation of past discrimination has no applicability in the age discrimination context.[6] Unlike a facially neutral test which may have a disproportionate effect on minority applicants because of past discrimination in educational opportunities, a neutral practice which disadvantages older workers is not the product of prior discrimination against workers in the protected age group. *See* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis,* 59 Neb. L. Rev. 345, 353-57 (1980). Rather, older workers are confronted with a different type of bias. As Senator Javits, one of the sponsors of the Act, noted:

> [T]here is simply a wide-spread irrationality that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs.

113 Cong. Rec. 31253 (1967).

The ADEA was enacted to protect older workers against intentional bias as a result of stereotyping them as less able to perform because of their age. Of course, the aging phenomenon permits all to attain this unique and limited protection from intentional discrimination only when the age of 40 is reached — reflecting the mutability of the characteristic encompassed by the ADEA. (DX 55A-C; A 129). Thus, in this context, the ADEA was designed to protect workers by precluding discrimination *because* they aged, not,

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[6] Then Secretary of Labor Wirtz issued a report in 1965 in response to the direction of Congress in Section 715 of the Civil Rights Act of 1964 that he conduct a study with recommendations for "legislation to prevent arbitrary discrimination in employment because of age . . . ." The report recognized at the outset the differences between age and race discrimination. "The Older American Worker: Age Discrimination In Employment" (June 1965), in Legislative History of the Age Discrimination in Employment Act (Washington: U.S. Government Printing Office, 1981), p. 2.

as in the *Griggs* context, to break down barriers to advancement of the protected group even in the absence of intentional discrimination. Accordingly, it would be "inappropriate simply to transplant [Title VII] standards in their entirety into a different statutory scheme having a different history." *See Washington v. Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring).

* * *

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IN THE

Supreme Court of the United States

Azel P. Smith, *et al.*,

Petitioners,

v.

City of Jackson, Mississippi, and
Police Department of the City of Jackson, Mississippi,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i
TABLE OF AUTHORITIES.....ii
REPLY BRIEF FOR THE PETITIONERS.....1
I. The EEOC Regulations Are Manifestly Reasonable in Light of This Court's Decision in *Griggs* and Numerous Other Precedents Holding That Parallel Language in Title VII and the ADEA Will Be Given the Same Construction. 2
II. The EEOC's Construction of the ADEA Represents the Best Reading of the Statutory Text. 8
III. Respondents' Hypothesized Practical Objections to Implementing Disparate Impact Claims Are Contrary to Decades of Actual Experience and Rest on Misstatements of the ADEA's Requirements. 14
IV. The EEOC's Regulations Providing That Disparate Impact Liability Is Cognizable Under the ADEA Are Entitled to *Chevron* Deference. 18
CONCLUSION.....20

TABLE OF AUTHORITIES

Cases

Alaska Dep't of Envtl. Conservation v. *EPA*, 124 S. Ct. 983 (2004) 19
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1983) 18
Christensen v. *Harris County*, 529 U.S. 576 (2000) 2
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 14
Connecticut v. *Teal*, 457 U.S. 440 (1982) 9, 10, 11
Crandon v. *United States*, 494 U.S. 152 (1990) 12
Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 10, 11
EEOC v. *Arabian American Oil Co.*, 499 U.S. 244 (1991) 2
EEOC v. *Wyoming*, 460 U.S. 226 (1983) 6
Fogerty v. *Fantasy, Inc.*, 510 U.S. 517 (1994) 3
General Bldg. Contractors Ass'n, Inc. v. *Pennsylvania*, 458 U.S. 375 (1982) 19, 20
General Dynamics Land Systems, Inc. v. *Cline*, 124 S. Ct. 1236 (2004) 3
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) ..... passim
Hazen Paper Co. v. *Biggins*, 507 U.S. 604 (1993) 10, 15
Lorillard v. *Pons*, 434 U.S. 575 (1978) 5
McKennon v. *Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) 5
Northcross v. *Board of Education*, 412 U.S. 427 (1973) ... 2, 5
O'Connor v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996) 17
Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 (1979) 3, 5
Radio Officers' Union v. *NLRB*, 347 U.S. 17 (1954) 20
Raytheon Co. v. *Hernandez*, 124 S. Ct. 513 (2003) 20
Sheehan v. *Daily Racing Form, Inc.*, 104 F.3d 940 (CA7 1997) 16
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 19

TWA, Inc. v. *Thurston*, 469 U.S. 111 (1985) 3
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 3
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 18
United States v. *Ron Pair Enters.*, 489 U.S. 235 (1989) 11
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 8
Wards Cove Packing v. *Atonio*, 492 U.S. 642 (1989) 17
Watson v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) ..... passim
Western Air Lines, Inc. v. *Criswell*, 472 U.S. 400 (1985) 3

Statutes

29 U.S.C. 621(b) 5
29 U.S.C. 623(a)(2) ..... passim
29 U.S.C. 623(f)(1) 1, 13, 15
29 U.S.C. 628 18
42 U.S.C. 12112(b)(3)(A) 17
42 U.S.C. 1973 20
42 U.S.C. 1973c 20
42 U.S.C. 1981 ..... 19, 20
42 U.S.C. 2000e-2(a)(2) 4

Other Authorities

110 Cong. Rec. 13,504 (1964) 5
29 C.F.R. 1625.7(d) 1, 19
46 Fed. Reg. 47,724 (Sept. 29, 1981) 18, 19
Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 51 (T. Nelson ed., 2002) 6, 7
Becca R. Levy, *Eradication of Ageism Requires Addressing the Enemy Within*, 41 THE GERONTOLOGIST 578 (2001) 6, 7
Br. for Resps., *Adams* v. *Florida Power Corp.*, No. 01-584, cert. dismissed, 535 U.S. 228 (2002) 17

Charles W. Perdue & Michael B. Gurtman, *Evidence for the Automaticity of Ageism*, 26 J. EXPERIMENTAL PSYCHOL. 199 (1990) 6

Eileen R. Kaufman, *Choosing the Insidious Path:* West Virginia University Hospitals, Inc. v. Casey *and the Importance of Experts in Civil Rights Litigation*, 19 N.Y.U. REV. L. & SOC. CHANGE 57 (1992) 16

Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense*, 66 BOSTON L. REV. 155, (1986) 5

John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STAN. L. REV. 983 (1989) 16

John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 BAYLOR L. REV. 267 (1998) 16

Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071 (1998) 17

Margaret M. Gembala, Note, *ADEA and the Hostile Work Environment Claim: Are the Circuit Courts Dragging Their Feet at the Expense Of the Harassed Older Worker?*, 7 ELDER L.J. 341 (1999) 7

Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination In Employment Act*, 68 MINN. L. REV. 1038 (1984) 7

Pet. for Cert., *EEOC* v. *Francis W. Parker School*, No. 94-1558, cert. denied, 515 U.S. 1142 (1995) 18

PollyBeth Proctor, *Determining Reasonable Accommodation Under the ADA: Understanding Employer and Employee Rights and Obligations During the Interactive Process*, 33 S.W.U. L. REV. 51 (2003) 17

Robert McCann & Howard Giles, *Ageism in the Workplace*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 163 (T. Nelson ed., 2002) 7

REPLY BRIEF FOR THE PETITIONERS

The parties agree that this case presents only the threshold question whether the ADEA "makes actionable 'disparate impact claims.'" Resp. Br. 4. That is, the dispute is over whether the statute applies to employer practices that have a significant adverse effect on older workers, but that lack a reasonable business justification. Respondents contend that it does not, arguing that the statutory prohibition on age discrimination "does not include the adverse effects of unjustified neutral practices." *Id.* 41.

That position must be rejected because it is contrary to the EEOC's regulations providing that disparate impact claims are cognizable under the ADEA. 29 C.F.R. 1625.7(d). Those regulations are, at the least, reasonable and therefore binding, particularly in light of the Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Moreover, respondents' complaint that disparate impact liability in the age discrimination context invalidates valuable business practices ignores the EEOC's recognition that the scope of disparate impact liability under the ADEA is narrower than under Title VII, as the ADEA extends liability only to business decisions that are not "reasonable," 29 U.S.C. 623(f)(1). The Commission has moreover given the ADEA a practical construction, recognizing that a disparate impact claim is more difficult to make out under that statute than under Title VII. See Pet. Br. 10 n.4. The precise requirements of petitioners' claim, and the appropriate burdens of proof, are appropriately left for the lower courts to consider in the first instance on remand.

The judgment below should accordingly be reversed.[1]

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[1] In their brief, respondents defend the court of appeals' judgment, but notably do *not* defend the principal elements of its reasoning. The Fifth Circuit majority refused to follow the EEOC's disparate impact regulations on the ground that they were analogous to the Department of Labor "opinion letter" at issue in

I. The EEOC's Regulations Are Manifestly Reasonable in Light of This Court's Decision in *Griggs* and Numerous Other Precedents Holding That Parallel Language in Title VII and the ADEA Will Be Given the Same Construction.

The EEOC's disparate impact regulations properly track this Court's holding in *Griggs* that disparate impact claims are cognizable under the parallel provisions of Title VII. The two statutes share the same text and "a common *raison d'être*" and thus are construed by this Court consistently. *Northcross* v. *Board of Education*, 412 U.S. 427, 428 (1973).

At bottom, respondents' attempt to distinguish *Griggs* is contradicted by the *six* different decisions of this Court, discussed in petitioners' opening brief, giving the same meaning to parallel provisions of Title VII and the ADEA. Pet. Br. 14-15 & n.9. Respondents concede, as they must, the "venerable" principle that parallel provisions in such closely related statutes will be given the same meaning absent compelling evidence of a contrary congressional intent. Br. 26. There simply is no such evidence here. The three cases respondents cite to suggest that this Court should depart from the normal rule of statutory construction and should not follow *Griggs* in this case (Br. 26-28) are each easily

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Christensen v. *Harris County*, 529 U.S. 576, 586-87 (2000), or the EEOC "Policy Statement" at issue in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991). Pet. App. 10a n.5. In fact, Congress delegated substantive rulemaking authority under the ADEA to the EEOC, which issued the regulations in question pursuant to notice-and-comment rulemaking. See Pet. Br. 30-31. The majority below also believed that there was a direct parallel between the "reasonable factors other than age" (RFOA) provision of the ADEA and a provision of the Equal Pay Act that (according to the Fifth Circuit) precludes disparate impact liability. Pet. App. 17a. In fact, there is a marked contrast between those provisions – and the Equal Pay Act does not in any event preclude disparate impact liability. See Pet. Br. 18, 21.

distinguishable. See *General Dynamics Land Systems, Inc.* v. *Cline*, 124 S. Ct. 1236, 1246-47 (2004) (relying on the distinction between the word "age" in ADEA and the terms "race" and "sex" in Title VII); *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 524-25 (1994) (relying on the distinction between the purposes of attorney's fees provisions in the Copyright Act and the "civil rights context"); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 208-12 (2001) (attributing different meanings to the phrase "wages paid" in benefits eligibility and back pay provisions, when prior precedent had explicitly held that one of the provisions had a different meaning).

Nor is it an answer that *Griggs* was decided after Congress enacted the ADEA. Contra Resp. Br. 25, 28. The logic of this Court's decisions is that Congress modeled the ADEA on Title VII and thus intended the two statutes to be interpreted consistently. The Court has repeatedly applied to one statute judicial constructions that were adopted *after* the enactment of the other. See, *e.g.*, *TWA, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (extending 1984 construction of Title VII's liability rule to ADEA); *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412 (1985) (extending 1977 construction of Title VII's BFOQ provision to ADEA); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979) (extending 1972 construction of Title VII § 706(c) to ADEA § 14(b)).

Respondents would distinguish these decisions on the ground that "the pertinent prohibitory language in the ADEA is different and narrower than the analogous but broader prohibitory language in Title VII," Br. 28, such that "Title VII does not so much as throw a cross-light on the proper interpretation of the ADEA," *id.* at 6. The most that respondents are willing to concede is that the ADEA is "phrased like," "similarly worded," or has "some similar language" to Title VII. *Id.* at 6, 25, 28.

Respondents' argument flies in the face of the plain text of the statute and ignores the wall of this Court's precedent

assigning the same meaning to parallel provisions of Title VII and the ADEA. In this case in particular, the relevant prohibitory provisions of Title VII and the ADEA are, of course, *identical*. The two statutes match each other word for word, with the sole exception – irrelevant to the question now before the Court – that in the ADEA Congress extended the protections afforded by Title VII from "race, color, religion, sex, or national origin" discrimination to "age" discrimination. 42 U.S.C. 2000e-2(a)(2); 29 U.S.C. 623(a)(2). And the precise parallel is no accident: as this Court has repeatedly recognized, Congress derived the ADEA provision *in haec verba* from Title VII. See Pet. Br. 12-15

Respondents' fall-back argument is that the identical language of the ADEA and Title VII should be construed differently because the statutes do not serve identical purposes. To be sure, the statutes may have different primary concerns when it comes to claims based on disparate *treatment*: the paradigmatic Title VII discrimination claim is more likely to involve a conscious decision to treat employees differently due to animus or a desire to injure or subordinate them. But that does not mean that Congress intended to limit ADEA liability only to the subset of cases in which the plaintiffs claim that they were the victims of purposeful discrimination, much less animus-based discrimination.

To the contrary, both the ADEA and Title VII are concerned with the *effects* of arbitrary exclusion of workers from employment even if those effects do not arise from purposeful discrimination. "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Just as "Congress directed the thrust [of Title VII] to the consequences of employment practices, not simply the motivation," *Griggs*, 401 U.S. at 432, the purpose of the ADEA – which has the identical prohibitory provisions – is to "promote employment of older persons

based on their ability rather than age," 29 U.S.C. 621(b). Respondents thus ignore on-point precedent holding that the two statutes should be construed identically because they "share common substantive features and *also a common purpose*: the elimination of discrimination in the workplace." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357-58 (1995) (emphasis added). See also *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978); *Northcross*, 412 U.S. at 428.

The EEOC has determined that disparate impact liability is vital to effectuate Congress's intent in enacting the ADEA. See Pet. Br. 27-28. Respondents provide no reason to override the judgment of the expert agency Congress charged with implementing the statute. As petitioners' opening brief demonstrated, disparate impact liability is an important tool for ferreting out subtle, *purposeful* discrimination. Disparate impact claims target discriminatory hiring practices that "could actually exist under the guise of compliance with the statute." *Griggs*, 401 U.S. at 435 (quoting remarks of Senator Case, appearing at 110 Cong. Rec. 13,504 (1964)).

Furthermore, "even if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain." *Watson*, 487 U.S. at 990. To combat age discrimination effectively, the ADEA must reach "facially neutral policies" that employers adopt "without recognizing or caring that these policies may have a disparate impact upon older workers." Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense*, 66 BOSTON L. REV. 155, 222 (1986).

The evidence suggests that indifference to the disparate impact of facially neutral policies on older workers is a pervasive problem. Practices that rest on subconscious age stereotypes cannot readily be attacked on disparate treatment grounds, because disparate treatment claims require proof of purposeful discrimination and thus presuppose that the

employer is aware that it is treating older workers differently. Employers who are otherwise unaware of their implicit ageism construct "rationalization[s]" for facially neutral employment decisions so that they may "attribute their behaviors * * * to another factor that better fits their preferred self-image as reasonably fair individuals." Becca R. Levy, *Eradication of Ageism Requires Addressing the Enemy Within*, 41 THE GERONTOLOGIST 578, 578 (2001) [hereinafter *Eradication of Ageism*]. These rationalizations mask the reality of how "a negative stereotype of age has been *automatically triggered*." *Id.* (emphasis added).

Congress in the ADEA thus sought to combat not only explicit age limits, but also subtler, ostensibly neutral employment practices that are "based in large part on stereotypes unsupported by objective fact, and [are] often defended on grounds different from its actual causes." *EEOC* v. *Wyoming*, 460 U.S. 226, 231 (1983). Recent studies have concluded that "all humans, to varying degrees, are implicated in the practice of *implicit ageism*" – a term the researchers define as "thoughts about the attributes and behaviors of the elderly that exist and operate *without conscious awareness, intention, or control*." Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 51 (T. Nelson ed., 2002) [hereinafter *Implicit Ageism*] (emphasis added). The existence of implicit ageism is also confirmed by empirical research. See, *e.g.*, Charles W. Perdue & Michael B. Gurtman, *Evidence for the Automaticity of Ageism*, 26 J. EXPERIMENTAL PSYCHOL. 199, 212 (1990) (describing results of an analytical study that identified "an unintentional and unconscious bias introduced into the processing of social information by age labels and stereotypes").[2]

[2] Discrimination of this sort remains a very serious problem, decades after Congress enacted the ADEA. Researchers have concluded that negative stereotypes about age are in fact *more pervasive* than unconscious race or gender bias. See, *e.g.*, Levy & Banaji, *Implicit Ageism*, *supra*, at 64. A separate 1999 study quantified the extent to which implicit age bias has permeated society: "95% of the participants had negative views of old people; this is a higher percentage than for implicit racism or sexism." Levy, *Eradication of Ageism*, *supra*, at 578. See also, *e.g.*, Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination In Employment Act*, 68 MINN. L. REV. 1038, 1062 (1984); Margaret M. Gembala, Note, *ADEA and the Hostile Work Environment Claim: Are the Circuit Courts Dragging Their Feet at the Expense Of the Harassed Older Worker?*, 7 ELDER L.J. 341, 342 (1999). These biases inevitably make their way into the workplace, because "every socialized individual who has internalized the age stereotypes of their culture is likely to engage in implicit ageism." Levy, *Eradication of Ageism*, *supra*, at 578. See also Robert McCann & Howard Giles, *Ageism in the Workplace*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 163, 176 (T. Nelson ed., 2002).

The Wirtz Report recommending the enactment of the ADEA is also consistent with the recognition of disparate impact liability. See Pet. Br. 26. Contra Resp. Br. 15-18. The Report targeted employment policies that have a "wholly unintended adverse effect" on older workers, J.A. 78, or "indirectly restrict the employment of older workers," *id.* at 66. Indeed, it even cited as an example of a troubling employment practice exactly the policy at issue in *Griggs*: a high school diploma requirement that will "obviously work against the employment of many older workers—unfairly, if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education." *Id.* at 41. Although respondents often note the Report's concern with "arbitrary" discrimination (*e.g.*, Br. 15, 17), that perfectly describes disparate impact liability: employment practices that adversely affect older workers but have no reasonable justification.[3]

[3] Respondents' further repeated claim that the Wirtz Report stated "that enacting a prohibition on neutral decisions with adverse effects on older workers is 'futile as public policy, and even

II. The EEOC's Construction of the ADEA Represents the Best Reading of the Statutory Text.

Respondents argue that this Court must reject the EEOC's regulations as an unreasonable construction of the ADEA. To the contrary, the EEOC's reading of the statute is not merely reasonable and thus entitled to *Chevron* deference, but is plainly the better one.

1. Preliminarily, we note that respondents' principal textual arguments – that Section 4(a) uses the phrase "because of," which appears in a clause introduced by a comma – are flatly precluded by this Court's precedents. The parallel provision of Title VII is identical. *Griggs* is therefore decisive, for it construes Title VII to recognize disparate impact claims. See *supra* Part I. *Griggs*'s holding rests, contrary to respondents' suggestion, Br. 28-29, on the text of Title VII. *Griggs*, 401 U.S. at 429 ("The objective of Congress in the enactment of Title VII *is plain from the language of the statute*." (emphasis added)). Respondents' position is thus inescapably an assault on *Griggs* itself, a decision that Congress has twice embraced (see Pet. Br. 11-12) and is thus firmly settled as a matter of *stare decisis*, the rule that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact," *Vasquez* v. *Hillery*, 474 U.S. 254, 265-66 (1986).

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contrary to the public interest,'" Br. 5, quoting J.A. 78; see also Br. 16, 43, is a *gross* mischaracterization. The quoted statement addressed only explicit age discrimination and has nothing to do with disparate impact claims: "The firmest conclusion from this year long study is that the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all *age restrictions* as 'arbitrary' and to concentrate on the prohibition of practices which include this element." J.A. 77-78 (emphasis added).

Moreover, two later decisions of this Court, which respondents inexplicably ignore, ground the recognition of disparate impact liability in the text of Title VII. As this Court explained in *Connecticut* v. *Teal*, 457 U.S. 440 (1982):

> When an employer uses a nonjob-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity "because of * * * race, color, religion, sex, or national origin."

Id. at 448. *Watson* reached precisely the same conclusion:

> We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. * * * If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to "adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin."

Watson, 487 U.S. at 990-91.

2. Respondents argue that the phrase "because of" in Section 4(a) requires the plaintiff to demonstrate that the employer engaged in purposeful discrimination. Br. 8. Of course, Title VII contains the identical phrase, so that *Griggs*, *Teal*, and *Watson* squarely preclude this argument. Indeed, the *Watson* plurality specifically employed the "because of" language in concluding that disparate impact claims require precisely the proof of causation that petitioners contend is involved in disparate impact cases:

> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions *because of* their membership in a protected group.

Watson, 487 U.S. at 994 (emphasis added).

In an effort to identify precedent to support their contrary position, respondents repeatedly claim that *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), held "that the phrase 'because of' in Section 4(a)(1) states a discriminatory intent requirement (and not a mere causation or correlation requirement)." Br. 38. See also *id.* at 8, 39, 40. This assertion is absolutely incorrect. *Hazen Paper* certainly did not call into question *Griggs*, *Teal*, and *Watson*. Instead, in *Hazen Paper*, this Court expressly declined to decide whether disparate impact liability is available under the ADEA, much less hold that such liability is precluded by the phrase "because of." See *Hazen Paper*, 507 U.S. at 611. The Court simply reiterated that *disparate treatment* liability *is* available under the ADEA. See *id.* at 609.

Even putting precedent to the side, however, respondents' argument lacks merit. The EEOC properly recognized that Congress used the single phrase "because of" to encompass not only purposeful discrimination, but also arbitrary measures that disadvantage older workers. Numerous examples illustrate the point. When the inevitable changes in physical condition that accompany aging cause an older employee to fail a mandatory test – such as a strength test, an examination, or even a general physical examination – and lose her job, that loss can be said to have occurred "because of" her age. Similarly, in *Griggs*, the diploma and standardized test requirements had a disproportionate impact on African Americans "because of" their race. And in *Dothard*, height and weight requirements for prison guards

discriminated against women "because of" their gender because they "would exclude 41.13% of the female population while excluding less than 1% of the male population." *Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977).

Respondents' answer to these examples is unconvincing. They argue: "contrary to petitioners' suggestion, if an employee is denied a job based on a physical strength test, the worker's employment prospects have *not* been adversely affected because of age, but rather because of physical weakness." Br. 39 (emphasis in original) (citing Pet. Br. 23). That is not correct. While it is surely fair to say (as respondents do) that the effect arose "because of physical weakness," it is *no less true* that the effect occurred "because of age." Age is simply a prior step in the causal chain.

2. The structure of Section 4(a)(2) confirms the EEOC's construction. The statute makes it unlawful for an employer

> to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age * * *.

29 U.S.C. 623(a)(2). Respondents emphasize the placement of a single comma in Section 4(a)(2), invoking "the normal rule" that "a comma between statutory clauses generally requires separating the language on either side." Br. 10. (Of course, the text of Title VII – addressed by this Court in *Griggs*, *Teal*, and *Watson*, which rightly conclude that the statute recognizes disparate impact liability – contains the same comma structure.) The common-sense principle of grammar identified by the cases respondents cite is that a clause "*set aside* by commas * * * * stands independent of the language that follows." *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (emphasis added). Section 4(a)(2) does not follow that structure: because there is no introductory comma after the phrase "to limit, segregate, or

classify his employees," the "deprive * * * or otherwise adversely affect" language is not properly read as "set aside" from the "because of such individual's age" clause.

Because it mixes singular and plural references to the employee, respondents' construction is also contrary to basic principles of grammar. On their reading, Section 4(a)(2) would make it unlawful for an employer "to limit, segregate, or classify his *employees* * * * because of *such individual's* age." The EEOC's construction, by contrast, more naturally separates the singular and plural references in the statute, reading it to prohibit employer conduct "which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect *his* status as *an employee*, because of *such individual's* age."[4] This Court paraphrased the parallel language of Title VII in exactly this manner. See, *e.g.*, *Watson*, 487 U.S. at 991 ("[T]he employer's practices may be said to 'adversely affect [an individual's] status as an employee, because of such individual's race * * * .'").

Presumably recognizing this flaw in their construction, respondents promptly retreat from their reliance on the comma to argue that "the 'because of' clause refers to and modifies the [remainder of Section 4(a)(2)] as a whole." Br. 10. But if Congress had intended that reading, it would have consistently referred to an employee using the singular form throughout Section 4(a). In any event, respondents do not explain how their position would be advanced even if the "because of" clause did modify the provision "as a whole."

3. The EEOC's reading is also confirmed by the ADEA's RFOA provision, which provides that "otherwise prohibited" conduct is not subject to liability if it is "based on

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[4] To the extent that the comma renders the statute ambiguous, the EEOC's construction is the better one because "a misplaced comma is more plausible than a gross grammatical error, plus the destruction of an apparently intended parallelism." *Crandon* v. *United States*, 494 U.S. 152, 170 (1990) (Scalia, J., concurring, joined by O'Connor and Kennedy, JJ.).

reasonable factors *other than age*" (emphasis added). 29 U.S.C. 623(f)(1) (emphasis added). Petitioners' opening brief identified, and respondents fail to rebut, two inferences from the RFOA provision that strongly support the conclusion that the ADEA recognizes disparate impact liability. See Pet. Br. 19-20. First, the ADEA cannot be limited merely to purposeful discrimination, because the RFOA provision operates on the premise that "otherwise prohibited" conduct includes action undertaken based on "factors other than age." Second, arbitrary action that disadvantages older workers is illegal, for the RFOA provision only exempts from liability conduct that is "reasonable," while unreasonable – but not purposefully discriminatory – employer conduct remains actionable.

Respondents argue that, because the RFOA provision refers to employer conduct that is "based on" non-age considerations, its application turns on "a motive-based inquiry [that] is wholly inconsistent with a disparate impact regime." Br. 14. That is a simple *non sequitur*. The fact that the RFOA provision exempts from liability certain non-age-based differentiations in no way implies the converse – *i.e.*, that only purposeful age discrimination gives rise to liability.

Respondents' construction is also far less plausible than the EEOC's because it reads the RFOA provision out of the statute. Respondents effectively concede that on their view the provision has no independent meaning; their assertion that the RFOA provision merely "*confirms* [when] an action is lawful," Br. 34 (emphasis added), is just their best spin on that point.[5]

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[5] Respondents specifically assert that the RFOA provision serves that "confirm[ing]" role – which, as noted in the text, merely renders the provision surplusage – in mixed-motive and pretext cases. Br. 34. Nothing in the statute's text, structure, or legislative history suggests that Congress intended such a meaning. Further, while the cases that respondents cite do invoke the RFOA provision as evidence of the standard for imposing liability in mixed-motive

Although respondents are correct that this Court has on occasion determined that certain statutory provisions are surplusage, Br. 38, there is a strong contrary presumption. This Court's precedents "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 113 (2001). Respondents provide no reason to depart from this canon of statutory construction here. And by changing the liability that would otherwise attach – that is, by eliminating liability for a subset of the employer conduct that is "*otherwise prohibited*" under Section 4(a) "where the differentiation is based on *reasonable* factors other than age" – the statutory text expressly rejects the contention that the RFOA provision merely "confirms" the liability rule already established by Section 4(a).

4. Respondents finally argue that the EEOC's regulations impermissibly "equate[] the RFOA provision with a 'business necessity' standard." Br. 48. That is not correct. The regulation does track the reference to "business necessity" in this Court's decision in *Griggs*, but that is because *Griggs* described the standard as requiring an employer to show that the employer practice is "a reasonable measure of job performance." *Griggs*, 401 U.S. at 436. As discussed *supra* at 1, the EEOC has recognized that the ADEA imposes a less rigorous standard than does Title VII.

III. Respondents' Hypothesized Practical Objections to Implementing Disparate Impact Claims Are Contrary to Decades of Actual Experience and Rest on Misstatements of the ADEA's Requirements.

Respondents' remaining contention that disparate impact liability cannot be implemented under the ADEA in a practical fashion also lacks merit. Their claim that employers will be forced to resort to quotas to protect themselves from

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and pretext cases, they do *not* – as respondents contend – hold that the RFOA provision serves *merely* that purpose.

liability, Br. 24, ignores decades of actual experience. The EEOC has recognized the validity of disparate impact claims since at least 1981. Before this Court's 1993 decision in *Hazen Paper*, every circuit to consider the question agreed. See Pet. Br. 10. Even today, three circuits continue to recognize disparate impact liability. Yet respondents are not able to identify a *single instance* over that period of decades in which *any* of their asserted practical objections to the implementation of disparate impact claims under the ADEA have come to pass. That body of actual experience is telling.

There are several reasons that respondents' hypothesized concerns have never arisen in practice. First, and foremost, their claims rest on a mischaracterization of the substantive rule of law. The ADEA does not require employers to impose quotas or anything of the sort. To the contrary, employers are immune from liability so long as the challenged employment practices are "reasonable." 29 U.S.C. 623(f)(1). Employers thus face the prospect of liability only if their policies rest on unreasonable approximations rather than considered judgments. As this Court concluded in *Watson*, "the evidentiary standards that apply in [disparate impact] cases should serve as an adequate safeguard against" undue burdens on employers, as "the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment." 487 U.S. at 993, 999.

Moreover, in analyzing the question whether practices are reasonable, the EEOC, acting pursuant to Congress's express delegation of interpretive authority, has adopted a construction of the ADEA that is sensitive to the fact that there may well be a greater number of justifiable and beneficial business practices that affect older employees than will adversely affect employees of a particular race, gender, or national origin. The Commission has accordingly recognized that a more lenient standard applies under the ADEA than Title VII. See Pet. Br. 10 n.4.

Nor can respondents fall back upon a "fear" by employers that they will be subject to meritless litigation. This Court has already rejected the argument "that disparate impact liability theory need have any chilling effect on legitimate business practices." *Watson*, 487 U.S. at 993. The Court's expectation has been borne out by decades of actual experience. Disparate impact claims are rarely filed, amounting to just one employment discrimination claim in fifty. John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STAN. L. REV. 983, 998 n.57 (1989) ("[T]he proportion of disparate impact cases in the * * * Survey * * * was 1.84%."). The reasons are easy to understand: disparate impact litigation is exceedingly expensive for the plaintiffs (as it depends on expert statistical analysis) and is therefore reserved for claims with genuine merit. See, *e.g.*, Eileen R. Kaufman, *Choosing the Insidious Path:* West Virginia University Hospitals, Inc. v. Casey *and the Importance of Experts in Civil Rights Litigation*, 19 N.Y.U. REV. L. & SOC. CHANGE 57, 69 n.113 (1992).

Employee-plaintiffs moreover face substantial hurdles in making out such a claim, a well-known fact that restrains the initiation of litigation and that allows for the early disposition of meritless cases. Plaintiffs must present, at a minimum, significant evidence that a particular employment practice causes a demonstrable disparate impact. Courts evaluating disparate impact claims will not hesitate to grant employers summary judgment or even judgment notwithstanding the verdict after trial in appropriate cases. See John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 BAYLOR L. REV. 267, 287 n.103 (1998); see also, *e.g.*, *Sheehan* v. *Daily Racing Form, Inc.*, 104 F.3d 940, 942 (CA7 1997) (Posner, J.) (according a plaintiff's flawed statistical analysis "zero weight" in deciding defendant's motion for

summary judgment because it would be inadmissible at trial).[6]

Respondents' argument also depends on the assumption that a plaintiff's demonstration of a disparate impact will shift the burden of persuasion to the employer to prove that the challenged practice is nonetheless justifiable. That question is unresolved and not presently before the Court. For example, in the *Adams* case (in which this Court previously granted certiorari to decide whether the ADEA recognizes disparate impact claims) the employer strenuously took the opposite position, arguing that plaintiffs retain throughout the case the obligation to prove that the employer acted unreasonably. Br. for Resps., *Adams* v. *Florida Power Corp.*, No. 01-584, at 10, 36, 38, cert. dismissed, 535 U.S. 228 (2002). And although Congress overruled the holding of *Wards Cove* that Title VII plaintiffs have the burden of proof at all stages of a disparate impact case, see *Wards Cove Packing* v. *Atonio*, 492 U.S. 642, 659 (1989), it has taken no express action with respect to plaintiffs' burdens under the ADEA.[7]

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[6] Nor do disparate impact claims increase the volume of litigation, as they almost always accompany disparate treatment claims that would be filed in any event.

[7] Nor is there merit to respondents' assertion, Br. 20, that a disparate impact standard cannot be implemented under the ADEA because age is not a "dichotomous" variable. No court has reported difficulty with administering a case on this basis. The Americans With Disabilities Act, for example, permits disparate impact claims. 42 U.S.C. 12112(b)(3)(A). Whether one is disabled within the meaning of the ADA is frequently a question of degree. See PollyBeth Proctor, *Determining "Reasonable Accommodation" Under the ADA*, 33 S.W.U. L. REV. 51, 52-53 (2003); *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996); Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1122, n.313 (1998).

IV. The EEOC's Regulations Providing That Disparate Impact Liability Is Cognizable Under the ADEA Are Entitled to *Chevron* Deference.

Petitioners' opening brief demonstrated that the EEOC's regulations recognizing that the ADEA provides for disparate impact liability are entitled to *Chevron* deference because they were both (i) issued pursuant to an express congressional delegation of authority, see 29 U.S.C. 628; and (ii) promulgated following notice-and-comment rulemaking, see 46 Fed. Reg. 47,724 (Sept. 29, 1981). See generally *United States* v. *Mead Corp.*, 533 U.S. 218, 229-31 (2001).[8] Particularly in light of this Court's decision in *Griggs* interpreting identical language in the parallel provision of Title VII, the EEOC's regulations represent a permissible, and therefore binding, construction of the statute. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).[9]

[8] Respondents note that the Department of Justice has not appeared in this case to defend the EEOC's regulations. However, the Department of Justice often does not appear in civil rights litigation, as the government's self-interest as a defendant causes DOJ to urge a narrow construction of civil rights laws. Congress delegated authority to interpret the ADEA to the EEOC, rather than to DOJ, and (as respondents point out, Br. 45) positions taken by the DOJ in the course of representing government defendants are not entitled to any weight. In any event, respondents omit that the Solicitor General has strenuously defended these very disparate impact regulations in this Court on behalf of the EEOC. See Pet. for Cert. 13-14, *EEOC* v. *Francis W. Parker School*, No. 94-1558 ("While the protection against disparate treatment is of undeniable importance in fulfilling the purposes of the ADEA, that protection alone is incomplete."), cert. denied, 515 U.S. 1142 (1995).

[9] Contrary to respondents' assertion that the regulations merely "assum[e]" the availability of disparate impact liability, Br. 6, 44, the regulations do in fact recognize disparate impact claims, as respondents' *amici* rightly concede. See 29 C.F.R 1625.7(d); 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981) (codified as amended at 29 C.F.R. pt. 1625) (citing *Griggs*); Pet. Br. 8. See also, *e.g.*, Pacific Legal Foundation Br. 17 (EEOC "has issued regulations applying disparate impact liability to the ADEA. 29 C.F.R. § 1625.7 (1981)."); Chamber of Commerce Br. 30; National League of Cities Br. 15-16.

Respondents therefore face the substantial burden under *Chevron* of proving that the EEOC's construction of the ADEA is unreasonable.[10] Respondents labor to lower the bar that they must overcome by repeatedly asserting that petitioners must produce "convincing evidence" of Congress's intent to recognize disparate impact liability. See Br. 2, 4, 5, 11, 25. That argument relies on language plucked out of context and thus lacks merit. In *General Building Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375 (1982), the Court held that 42 U.S.C. 1981 – which originally "was enacted as a means of enforcing the recently ratified Fourteenth Amendment," *id.* at 389, a provision that itself reaches only purposefully discriminatory conduct – does not recognize disparate impact claims. The Court explained: "Although Congress might have charted a different course in

Respondents also mischaracterize the import of the predecessor Department of Labor guidance. In fact, the DOL did provide for disparate impact liability. See Pet. Br. 8, 33-34; see also Br. of *Amicus Curiae* National Employment Lawyers Association and Trial Lawyers for Public Justice 4-14. Respondents' contrary reading of that guidance rests on its selective use of quotations showing that the ADEA is *also* concerned with purposeful age discrimination – a fact that no one disputes and that does not negate the other provisions of the DOL guidance that are only consistent with disparate impact liability.

[10] Or at the very least, respondents must establish under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), that the regulatory provision is an "impermissible" construction of the statute notwithstanding the EEOC's consistent position and delegated expertise in administering the ADEA. See Pet. Br. 36-37 n.22 (citing *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1004 (2004)).

enacting the predecessors to § 1981 than it did in proposing the Fourteenth Amendment, we have found no convincing evidence that it did so." *Id.* at 391. When this Court concluded that there was no "convincing evidence" that Congress intended Section 1981 to reach nonpurposeful conduct, it was thus not stating a general presumption against finding disparate impact claims cognizable; rather it was making the far more limited point that, in light of the connection between Section 1981 and the Fourteenth Amendment, there was no evidence to overcome the conclusion that the two provisions should be interpreted consistently with one another.

Nor is there a broader background presumption against the recognition of disparate impact liability under the civil rights statutes. Contra Resp. Br. 4, 32-33. Respondents' reliance on the failure of some other statutory schemes to recognize disparate impact liability ignores that the nation's principal civil rights statute – Title VII – does recognize disparate impact liability, and that Title VII was the model for the ADEA provision at issue in this case. Respondents also ignore the availability of disparate impact liability under the Americans with Disabilities Act, see *Raytheon Co.* v. *Hernandez*, 124 S. Ct. 513, 519 (2003), and under the Voting Rights Act, see 42 U.S.C. 1973, 1973c.[11]

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioners' opening brief, the judgment should be reversed.

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[11] At the *very least*, there was no such background assumption when Congress enacted the ADEA, for there were at that time only a small number of precedents of this Court even arguably construing a single statutory provision to require proof of purposeful discrimination. See, *e.g.*, *Radio Officers' Union* v. *NLRB*, 347 U.S. 17 (1954) (construing Section 8(a)(3) of the NLRA).

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5

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AZEL P. SMITH, *et al.*,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

BRIEF *AMICI CURIAE* OF AARP, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP), THE AMERICAN JEWISH CONGRESS, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF), MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF), MISSISSIPPI CENTER FOR JUSTICE (MCJ), NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), NATIONAL COUNCIL OF LA RAZA (NCLR), NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, NATIONAL SENIOR CITIZENS LAW CENTER AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE COURT HAS CONSTRUED LANGUAGE IN TITLE VII THAT IS VIRTUALLY IDENTICAL TO THAT IN THE ADEA AS THE SOURCE OF THE DISPARATE IMPACT THEORY 4

II. CONGRESS' INTENT TO REDRESS ALL FORMS OF "ARBITRARY" AGE BIAS, INCLUDING NEUTRAL POLICIES AND PRACTICES WITH A DISPARATE IMPACT ON OLDER WORKERS, IS SUPPORTED BY THE ADEA'S LEGISLATIVE HISTORY AND EARLY ENFORCEMENT HISTORY. 6

A. The ADEA's History Demonstrates Congress' Intent to Ban All "Arbitrary" Age Discrimination, Including Age-Neutral Policies and Practices that Fall More Harshly on Older Workers and Do Not Meet Genuine Employer Needs 8

1. The Wirtz Report Identified Neutral Employment Standards as a Form of Arbitrary Discrimination 10

2. Regulations and Advisory Opinions Reaffirm That Age-Neutral, Non-Job-Related Policies and Practices With Adverse Impacts on Older Workers Violate the ADEA 14

B. The Fifth Circuit Erred in Concluding that the Legislative History of the ADEA Precludes Reliance on the Disparate Impact Approach to Proving Age Discrimination 18

III. DISPARATE IMPACT IS AN ESSENTIAL COMPLEMENT TO DISPARATE TREATMENT IN POLICING WHAT THE COURT CONSIDERS TO BE THE "ESSENCE" OF AGE DISCRIMINATION 20

A. Stereotyping Is Often Unintentional 22

B. Disparate Impact is a Very Effective Tool for Policing Discrimination Based on Stereotypes 25

CONCLUSION 29

TABLE OF AUTHORITIES

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No. 03-1160

IN THE
SUPREME COURT OF THE UNITED STATES

AZEL P. SMITH, et al.,
Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*
Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

BRIEF *AMICI CURIAE* OF AARP, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP), THE AMERICAN JEWISH CONGRESS (AJC), ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF), MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF), MISSISSIPPI CENTER FOR JUSTICE (MCJ), NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), NATIONAL COUNCIL OF LA RAZA (NCLR), NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, NATIONAL SENIOR CITIZENS LAW CENTER AN THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization of more than 35 million people age 50 or older dedicated to addressing the needs and interests of older Americans. Approximately one half of AARP's members

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[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amici curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

remain active in the work force, most of whom are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-633. AARP supports the rights of older workers and the public policies designed to protect those rights and strives to preserve the legal means to enforce them. In this Court, AARP has participated as *amicus curiae* in, among others, the cases of *General Dynamics Land Sys. v. Cline*, 124 S.Ct. 1236 (2004); *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133 (2000); and *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

This brief is also submitted on behalf of the American Association of University Professors (AAUP), the American Jewish Congress (AJC), the Asian American Legal Defense and Education Fund (AALDEF), the Mexican American Legal Defense and Educational Fund (MALDEF), the Mississippi Center for Justice (MCJ), the National Association for the Advancement of Colored People (NAACP), the National Council of La Raza (NCLR), the National Partnership for Women and Families, the National Senior Citizens Law Center and the National Women's Law Center, all of which support the rights of older workers to be free from employment discrimination, whether on grounds of race, gender, national origin, religion, or age. The statements of interest of these *amici* are included in the appendix to this brief.

Amici urge the Court to reject suggestions that age discrimination in the work place is so fundamentally different from other forms of employment discrimination that Congress was convinced it could be adequately addressed by the disparate treatment theory alone. Holding that the ADEA encompasses both disparate treatment and disparate impact claims would be in complete harmony with the ADEA's congressional purpose as well as its legislative roots.

For these reasons, *amici curiae* respectfully submit this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

In order to fully implement the will of Congress expressed in the ADEA, older workers must have the right to

pursue both disparate treatment and disparate impact claims. While the court below concluded that Congress limited ADEA claimants to the disparate treatment theory of proof, there is no persuasive evidence of such limits in either the ADEA's text, its legislative history, or its administrative history.

Denying the disparate impact method of proving age discrimination to its victims will thwart the intent of Congress by insulating from challenge discriminatory conduct that Congress has deemed devastating to individuals, society, and the national economy, and by undermining the core civil rights principle that workers should be judged based on their abilities rather than characteristics unrelated to their participation in the work force, such as age. Because the consequences of discrimination are devastating regardless of the employer's motivation or the protected status of the victim, older workers must be afforded the same rights and avenues for redress as those enjoyed by victims of other forms of employment discrimination.

Those courts that have restricted ADEA claimants to the disparate treatment theory of proof have attributed to Congress an intent to differentiate between ADEA claimants and Title VII claimants that is found nowhere in either statute. They have selectively misread the ADEA's legislative history, which, contrary to their conclusions, contains strong affirmative support for the disparate impact theory. And, they have failed to recognize how the function and purpose of the disparate impact theory, as articulated by this Court, is perfectly suited to policing what the Court has stated it considers to be the "essence" of age discrimination.

ARGUMENT

I. THE COURT HAS CONSTRUED LANGUAGE IN TITLE VII THAT IS VIRTUALLY IDENTICAL TO THAT IN THE ADEA AS THE SOURCE OF THE DISPARATE IMPACT THEORY.

Section (4)(a)(2) of the ADEA provides that "[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his

employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). This language is the mirror image of § 703(a)(2) of Title VII, 42 U.S.C. § 2000e(2)(a)." In *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971), the Court cited § 703(a)(2) as the statutory foundation for its decision that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . ." 401 U.S. at 431. The Court has subsequently confirmed that the "adversely affect" language, that is identical to both Title VII and the ADEA, is the source of the disparate impact doctrine. *See Connecticut v. Teal*, 457 U.S. 440, 448 (1982).

In *Griggs*, the Court declared: "The objective of Congress in the enactment of Title VII *is plain from the language of the statute*." 401 U.S. at 429 (emphasis added). Accordingly, "[i]f the existence of the disparate impact approach is apparent from the 'plain' language of Title VII, it must also be apparent from the plain language of [the] ADEA." *EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 741 (D.C. Pa. 1985).[2/]

Since the ADEA and Title VII share common purposes and identical substantive provisions, they should be interpreted similarly. "The similarity in language [between § 623(a)(2) of the ADEA and § 703(a)(2) of Title VII] . . . is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973). *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 827 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993) ("It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a

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[2/] As Petitioners correctly argue, current ADEA regulations, 29 C.F.R. § 1625.7(d) (2003), issued in 1981 pursuant to authority assigned to the EEOC, *see* 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981); *see also infra.* n.14, provide for disparate impact claims based on this Court's ruling in *Griggs* and are entitled to deference.

second statute, the language of the two acts should be interpreted the same way."). The doctrine of *in pari materia* is especially appropriate for the ADEA and Title VII given that the substantive prohibitions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).[3/]

The conclusion that identical language in the ADEA and Title VII was intended to prohibit the same forms of discrimination is bolstered by the fact that in addition to "shar[ing] common substantive features," the ADEA and Title VII share "a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). In *Northcross v. Memphis Bd. of Educ.*, 412 U.S. at 428, the Court reasoned that interpreting statutes with similar language *pari passu* is particularly appropriate when "the two provisions share a common *raison d'etre*." (citing *Johnson v. Combs*, 471 F.2d 84, 86 (5th Cir. 1972)).

[3/] One textual difference between the ADEA and Title VII that courts have relied on to deny the disparate impact theory to age discrimination victims is § 623(f)(1) of the ADEA. This provision permits employers to make decisions based upon "reasonable factors other than age." The provision is fully consonant with the disparate impact method of proving age discrimination and in fact, mirrors disparate impact analysis. *Amici* fully agree with the arguments in the *amici curiae* brief of the National Employment Lawyers Association's (NELA) and the Trial Lawyers for Public Justice that the RFOA provision supports a claim of disparate impact under the ADEA.

II. CONGRESS' INTENT TO REDRESS ALL FORMS OF "ARBITRARY" AGE BIAS, INCLUDING NEUTRAL POLICIES AND PRACTICES WITH A DISPARATE IMPACT ON OLDER WORKERS, IS SUPPORTED BY THE ADEA'S LEGISLATIVE HISTORY AND EARLY ENFORCEMENT HISTORY.

The legislative history of the ADEA powerfully supports the disparate impact theory of liability in ways that strongly reinforce textual proof that Congress intended to permit such a claim. The legislative record - like the ADEA itself - follows the precedent set by Title VII: it identifies entrenched, longstanding patterns of inequity and conceives powerful legal mechanisms to end unfair exclusion of a large and important group of workers from the U.S. labor force. Moreover, the ADEA's drafters anticipated specific workplace inequities that became the focus of disparate impact litigation under Title VII and the ADEA.

The ADEA's text and enactment record both reflect a certain attention to nuance, as befits a "follow-on" enactment, coming three years after the 1964 Civil Rights Act. Regrettably, some lower federal courts, plumbing the legislative record for guidance on the issue of disparate impact, have failed to show such sensitivity. Instead, they rely on either superficial or anachronistic reasoning, or both. They produce not greater clarity, but rather, a crude caricature of the ADEA's history. They suggest that the problems characterizing and the means needed to combat age discrimination, in contrast with bias banned by Title VII, are dramatically different: *i.e.*, nearly unrelated, rather than siblings or first cousins. Such a misguided reading of the historical record can only support an erroneous interpretation of the Act.

Both sides in the disparate impact debate have looked to the ADEA's legislative history, and in particular to a Report by

U.S. Labor Secretary W. Willard Wirtz,[4] on which Congress drew heavily in crafting the ADEA.[5]

However, after conducting no more than superficial analyses of the ADEA's legislative history, several appellate courts concluded that the Court effectively decided the disparate impact issue in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993). *See, e.g., Adams*, 255 F.3d at 1326; *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008-09 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996). But even the Fifth Circuit in this case recognized that *Hazen Paper's* analysis of legislative history was necessarily limited, because only a disparate treatment claim was before the Court. *See Smith*, 351 F.3d at 195 n.14. A fresh analysis by this Court is warranted. Its conclusions should be harmonized with the diverse and powerful evidence supporting disparate impact claims under the ADEA, including Congress' determination to outlaw all age discrimination shown to be "arbitrary," whether in its intent or its effects.[6]

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[4] U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964* (1965) (hereinafter "WIRTZ REPORT" or "Report"). The Wirtz Report was compiled after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act. Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

[5] *Compare Smith v. City of Jackson*, 351 F.3d 183,193-95 (5th Cir. 2003) (majority opinion), with *id.* at 201-03 (Stewart, J., dissenting in part); *compare Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325 (11th Cir. 2001) (majority opinion), *cert. dismissed*, 535 U.S. 1054 (2002), with *id.* at 1330-31 (Barkett, J., concurring).

[6] While this Court conducted an extensive and thoughtful review of the ADEA's legislative history in *General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236 (2004), it did not squarely address the scope of "arbitrary discrimination" identified in the Wirtz Report or subsequently.

A. The ADEA's History Demonstrates Congress' Intent to Ban All "Arbitrary" Age Discrimination, Including Age-Neutral Policies and Practices that Fall More Harshly on Older Workers and Do Not Meet Genuine Employer Needs.

The Wirtz Report, the principal document establishing Congress' purpose in enacting the ADEA,[7] clearly recognized as "arbitrary," and thus needing remediation through civil rights legislation, facially neutral policies and practices falling more harshly on older workers that are devoid of any substantive business or other policy justification. Thus, without using the phrase "disparate impact," Secretary Wirtz unmistakably condemned, and paved the way for the ADEA to proscribe, employer practices of the identical sort the Court held unlawful under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The ADEA's focus on banning "arbitrary" discrimination anticipated *Griggs*' identification of "disparate impact" as a method for the "removal of artificial, *arbitrary*, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431 (emphasis added). Indeed, the Wirtz Report specifically described as arbitrary, and thus

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[7] The Wirtz Report's "findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress." *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). Congress directed the Secretary "to submit specific legislative proposals for prohibiting age discrimination"; these were endorsed by President Johnson and culminated in the 1967 law enacted by Congress. *Id.* at 230-32. For instance, the ADEA's preamble, 29 U.S.C. § 621(a), summarizes findings in the Wirtz Report on "individual and social costs of age discrimination." *EEOC v. Wyoming*, at 231. Likewise, the ADEA's text paraphrases strategies endorsed in the Report: "to promote employment of older persons based on their ability rather than age; to prohibit *arbitrary* age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (emphasis added).

targeted for regulation by civil rights law, various concrete practices later challenged in *Griggs*. *See infra* at 10-14.

The ADEA concept of "arbitrary discrimination" originated with Congress' directive to the Secretary requiring a report on age bias: "containing the results of such study" and including "such recommendations for legislation to prevent *arbitrary discrimination* in employment because of age as he determines advisable." WIRTZ REPORT at 1 (emphasis added). The following year, the Wirtz Report reaffirmed this approach, identifying "arbitrary discrimination" as the "kind [of bias] which might be dealt with by a statute prohibiting discrimination in employment on the basis of age." *Id.* at 18.

Although the Secretary's non-legal analysis naturally omitted proposed terminology for the conduct Congress should legally proscribe, the Wirtz Report does contain valuable clues to the scope of the terms Congress enshrined in the ADEA. For example, in the "Introduction," the Secretary described "arbitrary discrimination" against older workers as employer misconduct "most closely related" to employment discrimination banned by the 1964 Civil Rights Act. *Id.* at 2. To the extent Title VII of that Act has come to forbid disparate impact discrimination, it follows that the Secretary's formulation favors interpolation of the same force and effect into the ADEA. Further, the Wirtz Report declared that "arbitrary discrimination" consisted of the "non-employment" or "rejection" of older workers "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*." *Id.* (emphasis in original). This broad and fluid category of employer misconduct, often based on misguided stereotypes, is consistent with unlawful age discrimination encompassing the disparate impact theory of proof, and inconsistent with Respondents' proposed definition of illegal age bias as limited to overt and purposeful bias.

1. The Wirtz Report Identified Neutral Employment Standards as a Form of Arbitrary Discrimination.

Notwithstanding the clarity of the Introduction to the Report, the Fifth Circuit fixated on select portions of the remainder of the Report, to the wholesale exclusion of others that reaffirm the thrust of the preamble. *See* 351 F.3d at 194 n.13. To be sure, the Report discussed findings of a special study of express - *i.e.*, intentional - age limits in employment.[8/] And these age maximums are portrayed as "persistent and widespread" and "the most obvious kind of age discrimination in employment." WIRTZ REPORT at 6, 20. But none of these adjectives - and no other statement in the Report - identifies express age limits as the "sole" or "exclusive" form of bias that should be illegal. Indeed, the formulation "most obvious" flatly contradicts such a reading. *See* 351 F.3d at 194 n.13 (noting explicit age restrictions are the "*most dominant* form of arbitrary discrimination discussed in the Report") (emphasis added).

Moreover, the Report elsewhere condemned employer conduct with the same result - lesser opportunity for older workers - but involving unintentional discrimination. In particular, following a discussion of "specific age limitations, indiscriminately applied," WIRTZ REPORT at 11, the Secretary went on to discuss a separate category of employer "decisions made about aging and ability to perform in individual cases [in which] *there may* or may not *be arbitrary discrimination*." *Id.* at 5 (emphasis added). Wirtz considered this category of possible "arbitrary" bias ("The Necessary Force of Circumstance") to be "equally important" to understand as explicit age limits, because "the force of certain circumstances . . . unquestionably affect older workers more strongly, as a group, than they do younger workers." *Id.* at 11. Thus, the meaning of § 2(b) of the ADEA, 29 U.S.C. § 621(b), which broadly dedicates the Act "to prohibit arbitrary age discrimination," is not limited by § 2(a)(2), 29

8/ The study looked at 500 firms in five cities in those states without age bias statutes in order to assess "employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." WIRTZ REPORT at 6.

U.S.C. § 621(a)(2), simply because the latter includes the "most obvious" form of harm to older workers - "arbitrary age limits" - in a list of the problems to be addressed by the Act.

Were these "circumstances" unrelated to policies that courts now permit workers to challenge via disparate impact theory, such parsing of the Wirtz Report to persuade the Court to adopt a broad definition of "arbitrary" discrimination would be no more persuasive than Respondents' efforts to confine that term to a bare minimum. But repeatedly this section of the Report discusses factors associated with age bias of the sort that might, "depending on the individual circumstances," WIRTZ REPORT at 5, give rise to a viable "disparate impact" suit.

Secretary Wirtz cited four "Forces of Circumstance" that lead employers to adopt new job requirements difficult for older workers to meet; in some instances, he observed, such criteria may be unrelated to actual job needs. *Id.* at 11-15. This concisely summarizes the core facts supporting a *prima facie* case of disparate impact employment discrimination. Remarkably, the Report also went on to describe as unjust both job criteria held unlawful six years later in *Griggs* on a theory of disparate impact.

First, Wirtz criticized a high school graduation requirement for new employees, unjustified in terms of applicants' ability to do the job, and falling more harshly on members of a protected group, some of whom were qualified by virtue of experience, but few of whom graduated high school. WIRTZ REPORT at 3.[9/] *See Griggs*, 401 U.S. at 430-31 and n.6 (high school graduation required for all jobs other than laborers). The logic of Wirtz' concern is clear: in a U.S. labor market where educational attainment was (and still is) growing rapidly among younger workers, older workers consistently will fall short. The Report therefore implies, consistent with support for a disparate impact theory of liability, that "[a]ny employment

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9/ *See Id.* at 11-13 (noting, *inter alia*, that "[e]ven for many plant production jobs in the major industries, employers for a variety of reasons seek young workers with high school educations or equivalent vocational training"). The *Griggs* plaintiffs were power plant workers. 401 U.S. at 426.

standard" based on educational attainment "will obviously work against the employment of many workers – unfairly if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent [qualifications]." WIRTZ REPORT at 3.

Second, Wirtz objected to requirements that job applicants "pass a variety of aptitude and other entrance tests." *Id.* at 14. *See Griggs*, 401 U.S. at 427-28, 430-31 and n.6 (discussing aptitude tests used by the Company, their lack of a "demonstrable relationship" to job performance, and grossly disparate pass rates for both, favoring whites). Specifically, Wirtz noted that younger workers' "recency of education and testing experience," rather than any strong connection between test results and "average performance" or "steadiness of output," explained younger applicants' greater success in securing such jobs. WIRTZ REPORT at 14-15. Wirtz reasoned that some jobs require workers with "better" or more "recent" education, but others do not. For instance, "average performance of older workers compares most favorably in office jobs, where productivity ... rose with age." *Id.* at 14.[10]

Wirtz' clear-sightedness, six years before *Griggs*, is stunning. He, like the *Griggs* Court, criticized "not only overt discrimination but also practices that are fair in form, but

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[10] Were Wirtz writing today, he might expand considerably his passage on the arbitrary adverse impact on older workers of pre-employment testing. Since the mid-1960's, the testing industry has grown considerably in size and influence. *See generally* Nicholas Lehman, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY (Farrar Straus & Giroux 1999). *See also* Brenda Paik Sunoo, "Weighing the Pros and Cons of Pre-employment Testing," WORKFORCE, March 1997, at 125 ("Every professional human resource position I've held during the last 20 years has utilized pre-employment testing to help narrow large applicant pools and differentiate between levels of knowledge and skills among candidates."). Without a disparate impact theory of liability, it is virtually impossible to challenge a workplace test on age discrimination grounds. *See* 29 C.F.R. §1625.7(d) (2003) ("Tests which are asserted as 'reasonable factors other than age' will be scrutinized [by EEOC] with the standards set forth in Part 1607 of this title.").

discriminatory in operation." *Griggs*, 401 U.S. at 431. And his rationale was nearly identical: "[i]f an employment practice which operates to exclude . . . cannot be shown to be related to job performance," it is improper. *Id.* Wirtz' prescience should not be casually dismissed as coincidence.

Wirtz was especially concerned about older workers' problems due to rapid advances in technology. WIRTZ REPORT at 11, 13-14. These too, he concluded, tended to generate employment criteria likely to disadvantage older workers. Although the Secretary seemed to view such trends as more likely posing difficulty for older workers meeting legitimate job qualifications, he also identified reasons to believe that these forces could produce unwarranted stereotypical thinking. Thus, although older workers might become "entrenched in areas from which jobs have disappeared," *id.* at 13, by contrast, in what we might now describe as "high tech" areas, a "young work force might then come to be regarded as a 'normal' work force, and the hiring of older workers as 'exceptional.'" *Id.* at 14.

Even if Secretary Wirtz did not identify by name the "disparate impact" method of proof in 1965 that this Court recognized as a means to combat "arbitrary discrimination" in 1971, his Report clearly acknowledged that age-neutral job criteria could produce "arbitrary discrimination" against older workers even though such criteria might be founded simply on faith in "'progress,'" *id.* at 3, rather than age-based animus. By describing such age-neutral bias as "arbitrary," the Report clearly supported it being prohibited by what became the ADEA.

The Wirtz Report also cited evidence of "arbitrary discrimination" in still other types of employment policies and practices involving unintentional bias against older workers. With regard to "Institutional Arrangements that Indirectly Restrict the Employment of Older Workers," Wirtz stated that "[t]he practice of generalizing personnel hiring policy by arbitrary rules which ignore individual differences is itself a factor that deprives companies of talent and qualified workers of opportunity." *Id.* at 15. Similarly, the Report observed with regard to employer benefit plans that:

> The extent to which the range of pension plan-induced limitations on employment can be considered to constitute arbitrary discrimination is not a simple matter, particularly in the light of the great variations in plan provisions and employer practice. Case-by-case examination is necessary to separate reasonable from unreasonable practice.

Id. at 17.

2. Regulations and Advisory Opinions Reaffirm That Age-Neutral, Non-Job-Related Policies and Practices With Adverse Impacts on Older Workers Violate the ADEA.

Following the ADEA's enactment, the Secretary of Labor supervised issuance of two sets of materials highly relevant to interpretation of the new law. Both strongly reaffirmed language in the Report to the effect that the ADEA was intended to ban age-neutral, non-job-related, employment practices with adverse disparate impact on older workers. First, the Department of Labor (DOL) promulgated interpretive regulations, *see* 29 C.F.R. Part 860 (1968), within days after the ADEA went into effect. Second, in the ensuing months, the Department began issuing interpretive opinion letters.

DOL regulations required, *inter alia,* with regard to physical requirements: (a) that age-neutral fitness standards be "reasonably necessary for the specific work to be performed"; (b) that a "differentiation based on a physical examination, but not one based on age" was "reasonable" only for positions which "necessitate" stringent physical requirements; and (c) that pre-employment physical examinations distinguish between the physical demands of various jobs.[11/] In addition, the regulations

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[11/] These provisions, 29 CFR § 860.103(f)(1)-(2), "were entirely consistent with Secretary Wirtz's findings three years earlier that physical requirements (continued...)

provided that age-neutral employment evaluation criteria like quantity of output, quality of production, or educational level had to have "a valid relationship to job requirements." 29 C.F.R. § 860.103(f)(1)-(2).[12/]

The regulations also clarified an important aspect of the Wirtz Report. In the Secretary's discussion of express age limits, he noted that

> [a] significant proportion . . . are arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements, and are defended on grounds apparently different from their actual explanation.

WIRTZ REPORT at 7. The Report enumerated nine such employer "defenses" of age limits, eight of which (other than "Desired age balance in the work force") have no direct connection to age. *Id.* at 8. Thus, the regulations confirm, as suggested in the Report, that even after the ADEA's enactment, most age limits made unlawful by the Act could be defended on age-neutral grounds,

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[11/](...continued)
(i.e., strength, speed, dexterity, quantity of work) were employers' most frequently mentioned consideration for restrictions on the hiring of older workers, but that many of these requirements had 'no studied basis.'" Keith R. Fentonmiller, "Continuing Validity of Disparate Impact Analysis for Federal Sector Age Discrimination Claims,"47 AM. U. L. REV. 1071, 1104 and nn. 195, 196 (1998) (quoting WIRTZ REPORT at 8, and referring to the Secretary's Research Materials at 4, 11-12). The Secretary submitted the "Research Materials" to Congress in June 1965 along with and in support of the Report. *See* WIRTZ REPORT at ii.

[12/] In this respect, the regulations also "echoed the Secretary's prior criticism of unfair educational requirements that 'penalize' the older worker [and] his finding that written tests with 'little direct relationship to the jobs' tended to preclude the employment of otherwise qualified older applicants." Fentonmiller, 47 AM. U. L. REV. at 1104-05 and nn. 198-200 (citing Research Materials at 81 and at 14, and WIRTZ REPORT at 3).

thus raising the issue how to assure that the "arbitrary discrimination" many of them represented could be challenged. The regulations did *not* answer this question by directing attention to the intentional discrimination such neutral rules might mask, consistent with the later-developed "disparate treatment" method of proof. Rather, the regulations set out guidelines for identifying which neutral rules with adverse impact on older workers are justified by employer needs, consistent with the later-developed "disparate impact" theory of proof.[13/]

The EEOC's current ADEA regulations are to the same effect, as Judge Barkett recognized in her *Adams* concurrence. That is, they recognize that the "reasonable factors other than age" defense "works in tandem with the business necessity defense in the disparate impact analysis." 255 F.3d at 1328.[14/]

Also in 1968, Secretary Wirtz's Department of Labor issued several advisory opinions regarding ADEA implementation confirming the view that age-neutral employer practices were subject to the Act. These declared, *inter alia*, that "'facially-neutral job requirements and employment practices, such as testing, must be validated and job-related.'" Fentonmiller, at 1104 and n.204 (citing Charles T. Lindquist, Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, ADEA Opinion Letter (August 1, 1968)

[13/] The same can be said of the regulations as revised in early 1969 to clarify, for example, that even a validated employee test had to be "specifically related to the requirements of the job," as well as "fair and reasonable." 29 C.F.R. § 860.104(b) (1969).

[14/] Congress reassigned responsibility for administering the ADEA from the Department of Labor to the EEOC in 1979. *See* Reorg. Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19807 (May 9, 1979). Current regulations require that employment practices with an adverse impact on individuals 40 and over that are defended as based on [reasonable] factors other than age "can only be justified as a business necessity." 29 C.F.R. § 1625.7(d) (2003). And if an employment test has such adverse impact, it must be validated according to the Uniform Guidelines on Employee Selection Procedures *See id.* § 1607 (2003).

and Ben P. Robertson, Deputy Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't. of Labor, ADEA Opinion Letter (October 9, 1968)).

Wirtz consistently urged that the ADEA be interpreted broadly, in order to root out unfair and arbitrary treatment of older workers. The Secretary testified in 1967 that the purpose of the proposed ADEA was "to get away from arbitrary age distinctions and go to judgment of individuals on their merits"; he wondered "whether we should strike any reference to age at all in any connection and look at employment only in terms of whether the individual does have or does not have the capacity to do whatever job it is that individual is seeking."[15/] In the 1965 Report, at the outset of his "Conclusions and Recommendations," Wirtz declared:

> It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

WIRTZ REPORT at 21. In 1976 Congressional hearing testimony, former Secretary Wirtz lamented the lack of progress in eliminating barriers to age bias in the workplace and concluded: "there is more reason now, not less, for rigorous enforcement of the ADEA."[16/] Yet, that would be the precise result if the Fifth Circuit's ruling is affirmed.

[15/] *Age Discrimination in Employment, 1967: Hearings on S. 830 & S. 788 Before the Subcomm. On Labor of the Senate Comm. On Labor and Pub. Welfare*, 90th Cong. 51-52 (1967). Secretary Wirtz also asserted that the labor market was "putting more and more people with more and more competence and capacity out to pasture earlier and earlier."

[16/] *Impact of the Age Discrimination in Employment Act of 1967, Before the Subcomm. on Retirement Income and Employment, House Select Comm. on Aging*, 94th Cong. 2d Sess. 81 (1976).

B. The Fifth Circuit Erred in Concluding that the Legislative History of the ADEA Precludes Reliance on the Disparate Impact Approach to Proving Age Discrimination

As in *Adams v. Florida Power Corp.*, the Court confronts a federal appellate decision juxtaposing an overly confident assessment of the ADEA's legislative history with scant evidence of attention to the task. The Fifth Circuit reached two unfounded conclusions related to legislative history. First, the court opined that the Wirtz Report defined "arbitrary discrimination," as consisting solely of "explicit age limitations," *i.e.*, "a form of disparate treatment." *Smith*, 351 F.3d at 193-94 and n.13. Second, the court stated that ADEA's history differs materially from that of Title VII, in that it reflects a narrowly "refined purpose" in contrast with "the broad remedial purpose" that animates Title VII. *Id.* at 194.

The *Smith* court ignored a diversity of practices that the Wirtz Report condemned as "arbitrary." *See supra* at 10-14. Indeed, the Report mapped out a more complex taxonomy of age discrimination, in which some "arbitrary" age bias is explicit, but some is founded on actions of an "unthinking majority," WIRTZ REPORT at 3, and still more is premised on unjustifiable – but age-neutral – reliance on tests, physical and educational criteria and other factors unrelated to a worker's productivity or ability to do the job in question. Unaccountably, the court below appears to have simply bypassed many key passages of the Report.[17/] Thus, it was clear error to conclude that the Report equated "arbitrary discrimination" only with "explicit age limitations." 351 F. 3d at 194.

[17/] The decisions in *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1999) and *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.) *cert. denied*, 528 U.S. 811 (1999), suffer from the same analytical flaw. At page 6 of the Wirtz Report, a topic heading superficially associates "Arbitrary Discrimination [and] Specific Age Limits"; but as noted above, on pages 2, 5 and 6, the Report clearly embraces a much broader meaning of the term.

The court compounded its errors assessing the nature of "arbitrary discrimination" by drawing extreme and unwarranted conclusions from the Wirtz Report's discussion of the nature and origins of race discrimination. The Fifth Circuit correctly notes the Secretary's efforts to address the lack of invidious "prejudices in American life which apply to older persons." WIRTZ REPORT at 6. But the court simply assumes its own conclusion in reasoning the "mischief in the Report is ... more accurately targeted by a disparate treatment theory, not a disparate impact theory." 351 F.3d at 194. What is the basis for "more accurate[] target[ing]" if not an implicit presumption in favor of minimizing the scope of the ADEA? Certainly there is nothing in the Report itself to support the goal of "more accurate[] target[ing]." Nor is there anything in the Report to suggest arbitrary age bias is acceptable or deserving less than vigorous assault because it is less often animated by hate.

Moreover, the "targeting" thesis seems exactly wrong. If relatively more age bias than race bias is animated by subconscious stereotypes, rather than overt animus, and relatively more age bias than race bias has to be assessed for arbitrariness "depending on the individual circumstances," WIRTZ REPORT at 5, it follows that the disparate impact method of proof may be more central to an effective ADEA than to an effective Title VII. At a minimum, it follows that Congress intended at least as many and as powerful remedial tools to be included in the ADEA as in Title VII.

Nor is it clear why the Secretary's analysis could imply victims of age bias deserve any less relief than race bias victims. Surely it is true that the Secretary favored a more nuanced analysis in determining whether facially neutral policies mask irrational, discriminatory age bias than comparable bias based on race. But assuming such bias can be found, why sanction the one and not the other? Nothing in the Report suggests the Secretary intended such a result.

In embracing a narrow construction of the ADEA, the court also asserted that "[t]he cornerstone of *Griggs'* holding that disparate impact is cognizable under Title VII is ... the link between the history of educational discrimination on the basis of

race and the use of that discrimination to continue to disadvantage individuals on the basis of their race." 351 F.3d at 195. Once again the Fifth Circuit reached this neat formulation only by ignoring a great deal of the relevant landscape. For instance, the court failed utterly to explain how Title VII sex (or religion or national origin) disparate impact claims may be justified based on a rationale drawn exclusively from the history of race bias in America. Plainly, it cannot. Further, the court's rationale omits a justification for disparate impact race cases on behalf of whites or males. Finally, the court makes no mention of Secretary Wirtz's findings that older workers face their own "built-in headwinds" in the workplace. These persistent barriers – *e.g.*, an ever more outdated educational background; an ever more outdated test-taking capacity; an ever growing perception that certain assignments and jobs and even industries have passed you by – are surely different and less scurrilous in their origins than those faced by members of minority groups, especially African-Americans, but they are daunting nevertheless.[18/]

III. DISPARATE IMPACT IS AN ESSENTIAL COMPLEMENT TO DISPARATE TREATMENT IN POLICING WHAT THE COURT CONSIDERS TO BE THE "ESSENCE" OF AGE DISCRIMINATION.

In *Watson v. Fort Worth Bank & Trust*, a plurality of the Court noted that the disparate impact theory of proof is necessary to "adequately police[]. . . the problem of subconscious

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[18/] The court also ignored Secretary Wirtz's review of the history of explicit age limits, and the possibility that these established patterns of stereotypical thinking about older workers persist to this day. WIRTZ REPORT at 9-10; *see EEOC v. Wyoming*, 460 U.S. at (noting, *inter alia*, that in 1903, Colorado became the first state to adopt an age discrimination law applicable to employment).

stereotypes and prejudices." 487 U.S. 977, 990 (1988).[19/] Given that the Court has also stated that the "essence of age discrimination" is older workers being harmed by "inaccurate and stigmatizing stereotypes," *Hazen Paper Co.*, 507 U.S. at 610,[20/] the disparate impact theory must be available to attack the serious problem of age discrimination in the work place.[21/]

However, in the wake of the Court's comment in *Hazen Paper* that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA," *id.*, language which was not central to the decision, several courts wrongly inferred that "the ADEA only prohibits intentional discrimination." *See, e.g., Ellis*, 73 F.3d at 1008; *Mullin*, 164 F.3d at 701; *Adams*, 255 F.3d at 1326. These courts erred in taking such a giant leap from an observation about the nature of age discrimination.

[19/] *See also Alexander v. Choate*, 469 U.S. 287, 292-99 (1985) (discussing the *appropriateness* of disparate impact analysis under § 504 of the Rehabilitation Act since discrimination against the handicapped often results from thoughtlessness not animus).

[20/] In *EEOC v. Wyoming*, the Court also recognized, as the Wirtz Report explained, that irrational judgments based on age stereotypes were "often defended on grounds different from [their] actual causes." 460 U.S. at 231; *see* WIRTZ REPORT at 7. The Report elaborated that explicit age limits often were defended on age-neutral grounds, which non-age-based rationales were "undoubtedly believed to be in many cases" the true explanations of age limits. *Id.*

[21/] Judge Cudahy recognized this seemingly obvious contradiction in his dissent from *EEOC v. Francis W. Parker School*: "[T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes,' . . . This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw." 41 F.3d 1073, 1080-81 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995) (emphasis in original). *See also* Steven J. Kamenshine, "The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act, 42 FLA. L. REV. 229, 309 (1990) ("[T]he assertion that age discrimination results from unconscious stereotyping arguably cuts in favor of, not against, the application of disparate impact in age cases.").

First, while there can be no question that *one* of the reasons Congress enacted the ADEA was to combat discrimination based on "stereotypes unsupported by objective fact," *EEOC v. Wyoming*, 460 U.S. at 231, there is no basis in either the ADEA's language or the legislative history to restrict its reach to employment decisions based on stereotypes.[22/] Surely it was not the intent of this Court in *Hazen Paper* to thwart the will of Congress by grafting an additional criterion of proof onto the ADEA, severely curtailing the Act's broad protections.

A. Stereotyping Is Often Unintentional.

Since actions based on stereotypes are not necessarily intentional,[23/] it is erroneous to conclude that because inaccurate stereotypes are often behind age discrimination the ADEA only

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[22/] Taken at face value, this Court's comments are corroborated in the legislative record of the ADEA, which featured prominently the seemingly nationwide phenomenon of "persistent and widespread use of age limits in hiring." WIRTZ REPORT at 21. Yet the very same can be said of Congress' proceedings in enacting Title VII. That is, "facially-race discriminatory employment practices [were] the primary impetus behind the passage of Title VII in 1964," yet "[o]bviously disparate treatment does not define the limit of Title VII's reach, even though it may 'capture the essence' of Title VII's prohibitions." Fentonmiller, at 1112; *see* Kamenshine, 42 FLA. L. REV. at 291("in the same way Congress was preoccupied with overt racial policies when it outlawed race discrimination under Title VII"). It follows that Congress' and Secretary Wirtz's attention to "overt age restrictions as the most glaring age-based obstacles," *id.*, do not limit the reach of the ADEA.

[23/] The argument that disparate impact is inappropriate where discrimination is caused by stereotypes, not animus, "jeopardize[s] the availability of disparate impact in gender cases as well because gender discrimination, like age, is based more on paternalistic stereotypes than on malevolence." Kaminshine, 42 FLA. L. REV. at 310 (footnote omitted). For that matter, while "race discrimination is steeped in a history of unparalleled hatred and bigotry . . . race discrimination today is often based on the same kind of stereotypes and group-based assumptions about ability that form the basis of age discrimination." *Id.*

prohibits intentional discrimination. Actions based on stereotypes can be, and often are, unintentional, and the disparate impact theory is particularly well-suited to detecting discrimination caused by unintentional stereotyping. After all, the premise of the disparate impact theory is that "not all discrimination is apparent and overt. It is sometimes subtle and hidden. It is at times hidden even from the decisionmaker herself, reflecting perhaps subconscious predilections and stereotypes." *EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1080 (J. Cudahy, dissenting). This is especially true of age discrimination. Using the disparate impact theory to ferret out stereotypes based on age is consistent with the research on the nature and causes of ageism.[24/]

> Age distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent . . . Because of this relatively innocuous nature of ageism, the likelihood is considerable that employers may adopt facially neutral policies without recognizing or caring that these policies may have a disparate impact upon older workers.

Howard Eglit, "The Age Discrimination in Employment Act's Forgotten Affirmative Defense," 66 BOSTON LAW REV. 155, 222 (1986). *See also* Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 50 (Todd D. Nelson ed., 2002) ("[o]ne of the most insidious aspects of ageism is that it can operate without conscious awareness, control, or *intention to harm*.") (emphasis added).

[24/] The term "ageism" was coined by Robert N. Butler, M.D. to describe the "deep and profound prejudice against the elderly which is found to some degree in all of us." Robert N. Butler, WHY SURVIVE?: BEING OLD IN AMERICA 11 (1975). Butler describes ageism as "a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender . . . ." *Id.* at 12.

Recent research has focused on this unconscious age discrimination, also called "implicit ageism" which "is defined as the thoughts, feelings, and behaviors toward elderly people that exist and operate without conscious awareness or control, with the assumption that it forms the basis of most interactions with older individuals." Becca R. Levy, "Eradication of Ageism Requires Addressing the Enemy Within, 41 THE GERONTOLOGIST 578, 578 (Oct. 2001). In a related study, the authors explained:

> Age-related biases . . . may have become so routinized that they may influence social judgments at a level below that at which we consciously ascribe traits to others. Such 'automatic' ageism may be hard to eradicate if it has been incorporated into our implicit personality theories or social schemata and is evoked without awareness on our part.

Charles W. Perdue & Michael B. Gurtman, "Evidence for the Automaticity of Ageism," 26 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 199, 201 (1990). Unconscious ageism is pervasive in our society. "Ageism permeates our culture so thoroughly and conditions our attitudes and perceptions so much that most of us are unaware of most of the ageism in it." Erdman B. Palmore, AGEISM: NEGATIVE AND POSITIVE 98 (2d ed. 1999).

Unconscious discrimination is not unique to age discrimination. Like ageism, "[r]acism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. . . ." Charles R. Lawrence, III, "The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism," 33 STAN. L. REV. 317, 330 (1987).[25] However, "[a] survey of implicit ageism found that 95% of the participants had negative views of old people . . . a higher proportion than for implicit racism or sexism." Levy, at 578. *See also* Levy & Mahzarin, at 54-55 (discussing research

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[25] *See* Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Challenges and Cultural Change," 100 YALE L.J. 1731, 1764-68 (1991), for a discussion of studies establishing unconscious sexism.

that showed that anti-age attitude is "among the largest negative implicit attitudes ... observed. . . . .").

B. Disparate Impact is a Very Effective Tool for Policing Discrimination Based on Stereotypes.

It is well established in Title VII jurisprudence that disparate impact is a valuable tool in ferreting out subtle forms of discrimination. *See, e.g., In re: Employment Discrimination Litigation Against the State of Alabama*, 198 F.3d 1305, 1321 (11th Cir. 1999) ("a genuine finding of disparate impact can be highly probative of the employer's motive since a racial 'imbalance is often a telltale sign of purposeful discrimination.'") (quoting *International Board of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977)). Indeed, this Court recognizes that disparate impact may serve as an effective method of identifying intentional bias that is well hidden. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. at 987 ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (employer refusal to follow alternative workplace practice with lesser discriminatory impact is evidence that the challenged practice was merely a "pretext" for discrimination); *Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (same).[26]

The fact that "age discrimination is characterized more by indifference and thoughtless bias than by overt hostility . . . makes detection of unlawful motive impractical and enhances the risk of evasion." Kamenshine, at 318. "If individuals are not aware that a negative stereotype of age has been automatically triggered by a person's older age, they are likely to attribute their behaviors (*e.g.*, failure to hire. . .), to another factor that better

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[26] *See also EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1078 ("Moreover, disparate impact theory does not relieve the EEOC of its obligation to prove the error of the employer's ways. ... Ultimately, the EEOC must show that Parker's rationale is pretextual and ... is predicated on some stereotype, conscious or *unconscious*") (emphasis added).

fits their preferred self-images as reasonably fair individuals. Thus, rather than acknowledge that 'I hired a younger person in preference to an older person,' a rationalization, such as the older applicant's personality or training, might be evoked." Levy, at 578. *See also* Perdue, & Gurtman, at 200 ("characterizing the aged as unemployable, unintelligent, and 'naturally' unhealthy may help to rationalize discriminatory practices in employment . . . ."). As one commentator observed with regard to the same phenomenon in the context of race discrimination:

> When racism operates at a conscious level, opposing forces can attempt to prevail upon the rationality and moral sensibility of racism's proponents . . . . But when the discriminator is not aware of his prejudice . . . neither reason nor moral persuasion is likely to succeed. The process defect is all the more intractable, and judicial scrutiny becomes imperative.

Lawrence, 39 STAN. L. REV. at 349. Disparate impact is just as crucial to combating age discrimination as it is to challenging prejudice based on race, national origin, or sex. "People are more conscious of these latter biases but often are unaware of their age bias. Age stereotypes persist because people tend not to examine the basis for these stereotypes and also give disproportionate weight to any data they believe tend to support them." Raymond F. Gregory, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE 26-27 (2001).

Those circuits that have precluded the application of disparate impact to ADEA cases "seem to assume that only barriers based on animus create problems. But one can have a 'status quo' based on inaccurate stereotypes that society needs to destroy as much as one can have 'status quo' based on animus that should be swept away." Roberta Sue Alexander, "Comment: The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen World," 25 DAYTON L. REV. 75, 94 (1999).

If ADEA claims can be established only through disparate treatment analysis, it will be far more difficult to address the issue of unconscious prejudice and the "essence" of

age discrimination will be effectively insulated from challenge. Indeed, if as this Court suggested age discrimination is most often caused by stereotypes, then "a theory that tests only for intentional discrimination necessarily misses its mark much of the time." David Benjamin Oppenheimer, "Negligent Discrimination," 141 U. PENN L. REV. 899, 903-04 (1993). The end result is a "status quo" of age bias based on unconscious stereotyping. Indeed, research on age stereotyping suggests that we have already reached such a "status quo." Such research demonstrates that most individuals harbor specific beliefs about older people, that most of those beliefs are inaccurate, and that the stereotypes have persisted in disadvantaging older persons for decades.[27] For example, research on age stereotyping in employment has consistently found that older employees are almost always treated and rated less favorably than younger employees.[28]

The Fifth Circuit's conclusion that the ADEA lacks the "historical and remedial concerns that, in the Title VII context, led to the recognition of disparate impact claims directed at overcoming the consequences of past societal discrimination," 351 F.3d at 195, is a flawed basis for discarding disparate impact theory under the ADEA. As this Court itself has recognized, "We have not limited this principle [that some facially neutral employment practices are unlawful even in the absence of discriminatory intent] to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional

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[27] J. Levin and W.C. Levin, AGEISM: PREJUDICE AND DISCRIMINATION AGAINST THE ELDERLY 70-96 (1980).

[28] *See, e.g.*, Marc Bendick, Jr., Lauren E. Brown, & Kennington Wall, "No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers," 10(4) JOURNAL OF AGING & SOCIAL POLICY 5 (1999); Marc Bendick, Jr., Charles W. Jackson, & J. Horacio Romero, "Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices," 8(4) JOURNAL OF AGING & SOCIAL POLICY 25 (1996); Benson Rosen & Thomas H. Jerdee, "The Nature of Job-Related Age Stereotypes," 59 JOURNAL OF APPLIED PSYCHOLOGY 511 (1976); Benson Rosen & Thomas H. Jerdee, "Influence of Age Stereotypes on Managerial Decisions," 61 JOURNAL OF APPLIED PSYCHOLOGY 428 (1976).

discrimination." *Watson*, 487 U.S. at 988. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 339-40 (1977) (height and weight requirements had a disparate impact on women; a decision that had nothing to do with historical discrimination).

The Wirtz Report also refutes the argument that ageism lacks any history of entrenched bias. The Report documents a substantial record of "persistent and widespread" discrimination dating back at least to the beginning of the century. WIRTZ REPORT at 21. Indeed, it is a common misperception that discrimination against older persons, in contrast to discrimination based on race or gender, is a distinctly modern phenomenon. In fact, historians have documented that ageism has existed under various guises throughout history.[29/] The "hostility to age" manifest in contemporary stereotypes of older workers became a pervasive aspect of American culture during the latter half of the nineteenth century.[30/] By the end of the nineteenth century, American "[m]en found it difficult to secure employment at ages as low as 35 or 40; for women it was even younger." Kerry Segrave, AGE DISCRIMINATION BY EMPLOYERS 7 (2001). Job advertisements from the 1890's on frequently requested only "young" applicants. *Id.* at 6.

The perpetuation rationale also fails to account for the fact that Title VII addresses characteristics in such a way as to cover all workers, including whites, males, and other groups that have not been victimized by entrenched, historic patterns of invidious discrimination. Moreover, whether or not stereotypes are rooted in history is irrelevant to the debilitating effect those stereotypes have on older persons.

[29/] 4 OLD AGE IN A BUREAUCRATIC SOCIETY: THE ELDERLY, THE EXPERTS, AND THE STATE IN AMERICAN HISTORY: CONTRIBUTIONS TO THE STUDY OF AGING, ix (David Van Tassel & Peter N. Stearns, eds., 1986).

[30/] Brian Gatton, *The New History of the Aged*, in 4 OLD AGE IN A BUREAUCRATIC SOCIETY: THE ELDERLY, THE EXPERTS, AND THE STATE IN AMERICAN HISTORY: CONTRIBUTIONS TO THE STUDY OF AGING, 9 (David Van Tassel & Peter N. Stearns, eds., 1986).

As time marches on, age discrimination remains a pervasive force in our society. The ADEA was enacted 37 years ago, yet, age discrimination continues to impede the achievement of equality in the work place.[31/] "Like racism and sexism, ageism remains recalcitrant, even if below the surface. But it can be – and has been – churned up from its latent position."[32/]

CONCLUSION

In *McKennon v. Nashville Banner Publishing Co.*, the Court declared that "Congress designed the remedial measures in [the ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine their employment practices and, to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." 513 U.S. at 358 quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Without the disparate impact theory to challenge subtle forms of age discrimination, employers will not be encouraged to examine policies which adversely affect older workers, but instead will continue to ignore them so that rather than being eliminated, the last vestiges of age discrimination will likely become entrenched "operat[ing] to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430.

For the foregoing reasons, *amici curiae* respectfully urge this Court to rule that the disparate impact theory of proof is essential to fulfilling the ADEA's broad remedial purpose of eliminating age discrimination from the work place.

[31/] According to a recent survey of executives conducted by ExecuNet, "82 percent of those surveyed said that age discrimination is a serious problem in today's employment market, up from 78 percent three years ago. Nearly two-thirds of those surveyed said they have encountered age discrimination in a job search, up from 58 percent in 2001." Robyn A. Friedman, "Job Cuts: Looking for a Career Edge, Many Men are Seeking to Look More Youthful Through Cosmetic Surgery," FORT LAUDERDALE SUN-SENTINEL, at 1E (March 21, 2004).

[32/] Robert N. Butler, "Dispelling Ageism: The Cross-Cutting Intervention," 503 THE ANNALS 138, 140 (1989).

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APPENDIX

Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines. Among the AAUP's central functions is the development of policy standards covering academic freedom, tenure, institutional governance, freedom from discrimination, and other key issues in higher education. *See, e.g., On Discrimination* and *1940 Statement of Principles on Academic Freedom and Tenure,* AAUP Policy Documents & Reports (9th Ed., 2001). As this Court has recognized, AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). AAUP and its members are deeply concerned that the unavailability of the disparate impact method of proof under the Age Discrimination in Employment Act (ADEA) would undermine the ability of professors to ensure freedom from age discrimination in the academic workplace.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through litigation, legal advocacy and dissemination of public information. AALDEF has represented and assisted many Asian Americans on employment and discrimination matters. Disparate impact analysis should apply equally to all groups claiming discrimination whether under Title VII or under ADEA.

The American Jewish Congress is an organization of American Jews that seeks to protect fundamental constitutional freedoms, particularly the civil rights and liberties of American Jews and all Americans. Since Jews in America are an aging population, the American Jewish Congress is particularly concerned with issues that affect the welfare of older Americans. In this connection it has called attention to such problems as nursing home abuses, problems with Medicare, and issues involving the effectiveness of various state agencies

administering laws banning age discrimination; and has filed briefs in this Court in such cases as *Cruzan v. Director, Missouri Department of Health.*

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases under Title VII since the organization's founding. Preserving the right of Latinos to be free of discrimination, on whatever basis, in all aspects of employment is a primary goal of MALDEF's Employment program.

Amicus Curiae Mississippi Center for Justice (MCJ) is a non-profit public interest law firm headquartered in Jackson, Mississippi. Incorporated as a Mississippi non-profit corporation in 2002, MCJ supports the rights of older Mississippians, as well as all Mississippians, to be free from employment discrimination and puts legal advocacy in service to anti-discrimination activists who promote those laws. MCJ's legal work builds on Mississippi's rich history of activism to correct social injustices and protects the civil rights of Mississippians through full enforcement of their federal and state constitutional and statutory rights.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared as both plaintiff and *amicus curiae* before this Court and other courts throughout the nation in numerous civil rights cases.

The National Council of La Raza (NCLR) is the largest national Latino civil rights organization, which is an "umbrella organization" for more than 270 local affiliated community-

based organizations (CBOs) and about 33,000 individual associate members. In addition to providing capacity-building assistance to our affiliates and essential information to our individual associates, NCLR serves as a voice for all Hispanic subgroups in all regions of the country. As a civil rights organization, NCLR is vitally concerned with the maintenance of a strong, vigorous, and active federal civil rights enforcement system. NCLR believes that the proper use of the disparate impact standards is essential to protecting Hispanics, older workers, and other groups covered by Title VII of the Civil Rights Act and other laws prohibiting employment discrimination, from bias in the workplace.

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and minorities in employment.

The NSCLC, the National Senior Citizens Law Center, is a non-profit public interest law firm which for more than 30 years has focused upon legal issues affecting low income elderly persons. This includes work in the areas of health and income support as well as age discrimination. NSCLC has long recognized the devastating impact that discrimination can have upon older workers. This is so regardless of the underlying motivation of the discriminating conduct. NSCLC has consistently addressed age discrimination issues in its work, and has represented clients in litigation with age discrimination claims based upon claims of practices having a disparate impact.

The National Women's Law Center ("NWLC") is a nonprofit, legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure

equal opportunity for women in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has participated as *amicus curiae* in numerous cases involving employment law and civil rights issues.

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AZEL P. SMITH, *et al.*,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Academy of Florida Trial Lawyers is a statewide voluntary association of more than three thousand attorneys whose practice emphasizes litigation for the protection of the personal and property rights of individuals. The Academy has a substantial interest in the application of the legal standards relating to the rights of individuals. This case involves a significant question regarding the scope of liability under the Age Discrimination in Employment Act of 1967 (ADEA).

SUMMARY OF ARGUMENT

Section 4(a)(2) of the ADEA permits claims without regard to employer intent. Within that provision, the phrase "because of such individual's age" applies to the *impact* on any individual of an employer's action directed toward employees as a whole—not the action itself. A contrary reading would mean that Congress confused singular with plural.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court relied on the specific language of a provision identical to Section 4(a)(2) to permit disparate impact claims under Title VII. The Court should thus permit disparate impact claims under the ADEA.

ARGUMENT

1. Unless Congress Confused Singular with Plural, Section 4(a)(2) of the ADEA Permits Claims Without Regard to Intent.

Section 4(a)(2) of the ADEA concerns macro actions that an employer takes toward his employees as a whole, and the adverse impact of those actions on individuals:

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[1] The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amicus curiae* the Academy of Florida Trial Lawyers states that no counsel for either party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

> It shall be unlawful for an employer * * * to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2). The "way" that an employer acts towards employees is prohibited only if that way would adversely affect (or tend to adversely affect) "any individual * * * because of such individual's age." Section 4(a)(2) thus does not prohibit *actions* taken "because of" age; it prohibits actions causing (or tending to cause) an adverse impact on any individual where that impact happens "because of such individual's age."[2] Whether the employer intended to affect the individual adversely is irrelevant. The provision is purely result-oriented.[3]

In contrast, Section 4(a)(1) addresses those *actions* that an employer takes because of an individual's age:

> It shall be unlawful for an employer * * * to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1). The provision covers intentional conduct because an employer cannot knowingly act "because of" age without intending to treat workers differently

[2] Such an adverse impact would tend, for example, to occur where an employer had a facially age-neutral rule favoring newer hires or recent graduates.

[3] The ADEA's reasonable factors other than age defense (RFOA) accounts for decisions based on factors other than age that run afoul of this provision, if those factors are *reasonable*. 29 U.S.C. § 623(f)(1). It is a well-worn rule that—for purposes of intentional discrimination cases—an employer may act for a good reason, a bad reason, any reason at all, or no reason at all, as long as the employer does not act because of a discriminatory reason. Given that the RFOA expressly only applies to actions that the ADEA has "otherwise prohibited," the RFOA and its reasonability component make no sense without disparate impact claims.

because of age.[4] A catchall phrase accordingly provides that an employer shall not "otherwise *discriminate* against any individual * * * because of such individual's age." (Emphasis added).

Before *Hazen Paper*, most courts had held or assumed that the ADEA permitted disparate impact claims. *See, e.g., Finnegan v. Trans World Airlines*, 967 F.2d 1161, 1163 (CA7 1992) ("the weight of authority * * * is that disparate impact is a viable doctrine under the age discrimination law."). *Hazen*—especially the concurrence—questioned this assumption and fueled a contrary trend in the courts of appeals. 507 U.S. at 617-18 (Kennedy, J., concurring). The concurrence cited a Stanford Law Review article by student Pamela Krop that argued against disparate impact. *Id.* at 618 (citing Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 842-43 (1982)). The linchpin of that article was a purported "grammatical" argument that the proper construction of Section 4(a)(2) required the phrase "because of such individual's age" to apply to the employer's *actions*, *i.e.*, the actions were taken because of age. Krop, 34 STAN. L. REV. at 842-43. Ironically, however, the article rested on a *fundamental* grammatical mistake: it confused singular with plural.

[4] This does not mean that Section 4(a)(1) *only* covers intentional discrimination. If, for example, an employer acted because of subconscious stereotypes about older workers, those actions would be "because of" age, but not intentionally so. The ADEA was designed to combat "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), and the Court has held that disparate impact analysis is necessary to police "subconscious stereotypes and prejudices," *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988). *See also EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (age discrimination "based in large part on stereotypes"). The Court has explicitly left open whether Section 703(a)(1) of Title VII—which is identical to Section 4(a)(1)—covers disparate impact as well as disparate treatment claims. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977); *cf. Lorance v. AT&T*, 490 U.S. 900, 914 (1989) (Marshall, J., dissenting) (discussing claim under Section 703(a)(1) as involving the "disparate-impact wing" of the statute).

A correct grammatical analysis of Section 4(a)(2) exposes that the phrase "because of such individual's age" absolutely *cannot* apply to the employer's actions—"to limit, segregate, or classify his employees"—unless Congress meant to say:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* [because of such *individual's* age] in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2) (emphasis added). Since the insertion of the phrase "because of such individual's age" after "to limit, segregate, or classify his employees" is an obviously nonsensical reading of the language of the ADEA,[5] the proper reading of Section 4(a)(2) is:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities [because of such individual's age] or otherwise adversely affect his status as an employee, because of such individual's age.

Ibid (emphasis added). However, the law review article rejected this reading because then the "entire phrase amounts to no more than saying 'adversely affect.'" Krop, 34 STAN. L. REV. at 843 n.26. Perhaps so, but that is by far the more grammatical—and coherent—reading of this provision.[6]

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[5] As written by Congress, there is no "individual" preceding "limit, segregate, or classify his employees."

[6] There should not be much difficulty in accepting this construction, given the phrase "or *otherwise* adversely affect." (Emphasis added). The phrase is similar to the language in parallel section 4(a)(1) "or *otherwise* discriminate." Phrases like these, after specific examples, are accepted as statutory catchalls. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974) (explaining "any other factor other than" phrase in Equal Pay Act as a "catchall").

Unless Congress made a significant drafting mistake, Section 4(a)(2) does not require intent. Disparate impact claims should be permitted under the ADEA.

2. Contrary to popular belief, *Griggs* actually rested on the "specific language" of Title VII.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that language identical to Section 4(a)(2) permitted plaintiffs to proceed with disparate impact claims. *Griggs*, 401 U.S. at 431. Some arguments against permitting disparate impact claims under the ADEA center on a belief that *Griggs* was not based on the language of Title VII. But the Court contemporaneously explained in *Jefferson v. Hackney*, 406 U.S. 535, 549 n.19 (1972), that *Griggs* was indeed based on "the specific language of Title VII of the Civil Rights Act." Although the Court cited historical racial animus in *Griggs*, the Court has subsequently held that disparate impact applies to gender discrimination, *Dothard v. Rawlinson*, 433 U.S. 321 (1977), even though Congress' 11th hour inclusion of sex in Title VII does not suggest that Congress considered historical animus against women in passing the Act. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989). Because the ADEA contains the same language that the Court has construed to permit disparate impact claims, disparate impact claims should be permitted under the ADEA.

CONCLUSION

The Court should reverse the judgment below and hold that the ADEA permits disparate impact claims.

June 14, 2004

Respectfully submitted,

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IN THE

Supreme Court of the United States

AZEL P. SMITH, *et al.*,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, and
POLICE DEPARTMENT OF THE CITY OF JACKSON,
MISSISSIPPI,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE*, THE CALIFORNIA EMPLOYMENT LAW COUNCIL, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 2

I. CONGRESS' TREATMENT OF AGE DISCRIMINATION AND TITLE VII'S ADVERSE IMPACT THEORY OF RECOVERY CONVINCINGLY SHOW THAT CONGRESS INTENDED NO SUCH THEORY OF RECOVERY UNDER THE ADEA 5

A. The Secretary Of Labor Recommended, And Congress Enacted, Proscriptions Against Disparate Treatment Only 5

1. The Secretary of Labor's Report .. 5

2. The Resulting Legislation 7

B. Congress' Treatment Of Adverse Impact Issues In The Civil Rights Act Of 1991 Demonstrates That It Did Not Intend That Theory Of Liability To Apply Under The ADEA 9

Contents

	Page
II. AGE, AS A PROTECTED CHARACTERISTIC, IS FUNDAMENTALLY DIFFERENT FROM THOSE PROTECTED BY TITLE VII, AND CONGRESS COULD NOT REASONABLY HAVE INTENDED THE MODES OF PROOF ADOPTED FOR THE LATTER TO APPLY TO THE FORMER ..	11
A. Age Is Different	11
B. Unlike The Characteristics Protected By Title VII, An "Age Class" Would Be Malleable And Subject To Gerrymandering, Making An Employer's Task In Avoiding, Or Defending, Litigation Almost Impossible	17
III. IN ADEA ADVERSE IMPACT CASES, THERE WOULD BE A PARTICULAR DANGER THAT JURIES WOULD SECOND GUESS EMPLOYER BUSINESS JUDGMENT; CONGRESS DID NOT INTEND THIS RESULT	21
CONCLUSION	24

TABLE OF CITED AUTHORITIES

CASES

	Page
Abbott v. Fed. Forge, Inc., 912 F.2d 867 (6th Cir. 1990)	9
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	21
Arnold v. United States Postal Serv., 863 F.2d 994 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 846 (1989)	10
BedRoc Ltd., LLC v. United States, 124 S. Ct. 1587 (2004)	2
Bernard v. Gulf Oil Corp., 890 F.2d 735 (5th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990)	22
Blair v. Equifax Check Servs. Inc., 181 F.3d 832 (7th Cir. 1999)	16
Cassista v. Cmty. Foods, Inc., 5 Cal. 4th 1050, 22 Cal. Rptr. 2d 287 (1993) ...	1
Cotran v. Rollins Hudig Hall Int'l, Inc., 17 Cal. 4th 93, 69 Cal. Rptr. 2d 900 (1998)	1
Cunningham v. Cent. Beverage, Inc., 486 F. Supp. 59 (N.D. Tex. 1980)	14

Cited Authorities

	Page
Davidson v. Bd. of Governors, 920 F.2d 441 (7th Cir. 1990)	9, 10
DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3rd Cir.), *cert. denied*, 516 U.S. 916 (1995)	23
Dockins v. Benchmark Communications, 176 F.3d 745 (4th Cir. 1999)	13, 18
Dorsch v. L.B. Foster Co., 782 F.2d 1421 (7th Cir. 1986)	10
EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734 (E.D. Pa. 1985)	15
EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999)	18, 20
EEOC v. Wyoming, 460 U.S. 226 (1983)	5, 12
Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992)	14, 15
Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988)	1
Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978)	4

Cited Authorities

	Page
Geller v. Markham, 451 U.S. 945 (1981)	3, 10
Gen. Bldg. Contractors Ass'n v. Penn., 458 U.S. 375 (1982)	16
Gen. Dynamics Land Sys., Inc. v. Cline, 124 S. Ct. 1236 (2004)	*passim*
Gregory v. Ashcroft, 501 U.S. 452 (1991)	13
Hack v. President & Fellows of Yale College, 237 F.3d 81 (2d Cir. 2000), *cert. denied*, 534 U.S. 888 (2001)	22
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	3
Holder v. City of Raleigh, 67 F.2d 823 (4th Cir. 1989)	22
Hunter v. Up-Right, Inc., 6 Cal. 4th 1174, 26 Cal. Rptr. 2d 8 (1993)	1
Lamie v. United States Tr., 124 S. Ct. 1023 (2004)	2
Lorillard v. Pons, 434 U.S. 575 (1978), *codified at* 29 U.S.C. § 626(c)(2)	10

Cited Authorities

	Page
Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364 (2d Cir. 1989)	9, 18, 19, 20
MacPherson v. Univ. of Montevallo, 922 F.2d 766 (11th Cir. 1991)	9
Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976)	13, 18
Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987)	10, 15, 22
Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)	1
Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001)	17
O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996)	20
Pac. Bell v. Pallas, 502 U.S. 1050 (1992)	1
Pac. Gas & Elec. v. Tellez, 484 U.S. 908 (1987)	1
Price v. City of Chicago, 251 F.3d 656 (7th Cir. 2001)	23

Cited Authorities

	Page
Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989)	12
Sheehan v. Daily Racing Form, Inc., 104 F.3d 940 (7th Cir.), *cert. denied*, 521 U.S. 1104 (1997)	14
Skinner v. RLEA, 489 U.S. 602 (1989)	1
Sutton v. United Airlines, Inc., 527 U.S. 471 (2000)	8
In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978)	4
Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223 (1994)	1
Vance v. Bradley, 440 U.S. 93 (1979)	13
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)	9, 11, 19, 22
Washington v. Davis, 426 U.S. 229 (1976)	3

Cited Authorities

Page

Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988) 17, 21, 22

Worthy v. United States Steel Corp., 616 F.2d 698 (3d Cir. 1980) 22

STATUTES

42 U.S.C. § 1981a(c) 10

42 U.S.C. § 2000e-2(k)(1) 9, 21

29 U.S.C. § 621(b) 8

133 Cong. Rec. 1377 (1967) 9

Fed. R. Civ. P. 23(f) 17

Pub. L. No. 88-352, § 715 (1964) 5

MISCELLANEOUS

W. Wirtz, *The Older American Worker Age Discrimination in Employment Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964*, at 1-2 ..... 6, 14

INTEREST OF *AMICUS CURIAE*

The California Employment Law Council ("CELC") is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership comprises more than 50 private sector employers, including representatives from many different sectors of the nation's economy (aerospace, automotive, banking, technology, construction, energy, manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively they employ in excess of a half-million Americans.[1]

CELC has regularly been granted leave to proceed as *amicus curiae* in employment law cases in this Court, *see, e.g.*, *Pac. Bell v. Pallas*, 502 U.S. 1050 (1992); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. RLEA*, 489 U.S. 602 (1989); *Pac. Gas & Elec. v. Tellez*, 484 U.S. 908 (1987), and in the California appellate courts. *See, e.g.*, *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988); *Cassista v. Cmty. Foods, Inc.*, 5 Cal. 4th 1050, 22 Cal. Rptr. 2d 287 (1993); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 26 Cal. Rptr. 2d 8 (1993); *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223 (1994); *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal. 4th 93, 69 Cal. Rptr. 2d 900 (1998).

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1. Petitioners have given blanket consent to the filing of briefs *amicus curiae*, and respondents have consented to the filing of this brief. Petitioners' letter of consent is on file in the Office of the Clerk, and respondents' letter of consent is filed herewith. No party has authored this brief in whole or in part, and no party has made a monetary contribution to the preparation or filing of this brief. *See* S. Ct. R. 37.6.

This case is important to CELC's members, all of which are subject to the Age Discrimination in Employment Act ("ADEA"). While the pertinent legal authorities are examined in great and scholarly detail in respondent's brief on the merits — and CELC fully subscribes to the analysis offered in that brief — CELC and its members are particularly well-positioned to explain the practical implications of the statutory construction urged by petitioners. Because those implications are draconian, the Court should demand the clearest and most unambiguous evidence that Congress intended such a scheme. Because that evidence is absent here, the decision below should be affirmed.

ARGUMENT

The construction of a statute begins, and in most instances will end, with the statutory text. Secondary aids to interpretation are employed only when the text is inscrutable. *See BedRoc Ltd., LLC v. United States*, 124 S. Ct. 1587, 1593 (2004) (when the text of a statute is unambiguous, "our inquiry begins with the statutory text, and ends there as well"); *see also Lamie v. United States Tr.*, 124 S. Ct. 1023, 1029-30 (2004).

Petitioners, however, begin their analysis with the views of the Equal Employment Opportunity Commission ("EEOC") about the relevant language. Petitioners devote the bulk of their brief to the assertion that the agency's construction of that language is at least a creditable one, and therefore is entitled to deference from this Court. But as the Court reiterated just last Term, "deference to [the EEOC's] statutory interpretation [of the ADEA] is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1248 (2004).

In this instance, the statute's text could hardly be clearer. As then-Justice Rehnquist remarked in *Geller v. Markham*, 451 U.S. 945, 949 (1981) (opinion dissenting from denial of *certiorari*), Congress plainly did not authorize an adverse impact theory of recovery under the ADEA, an intention "revealed . . . in 29 U.S.C. § 623(f)(1), which provides that it shall not be unlawful for an employer to take any action otherwise prohibited [by the ADEA] 'where the differentiation is based on reasonable factors other than age.'" Indeed, the plain language and the structure of the ADEA compellingly show (a) that "the very essence of age discrimination" is disparate treatment, and (b) that it was this "essence [that] Congress sought to prohibit in [passing] the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Respondents skillfully parse the language and structure of the Act in their brief, and *amicus* CELC fully subscribes to that analysis. Attempting a similar effort in this brief would accomplish no purpose beyond burdening the record.

If more evidence of Congress' design is needed, however, it can be found in the unusually revealing historical path the ADEA took to enactment. The legislation resulted from an extensive study mandated by Congress and performed by the Secretary of Labor, W. Willard Wirtz. Analysis of his findings and the solutions he proposed to Congress tellingly demonstrates that Congress sought to impose statutory sanctions only for "arbitrary discrimination" — disparate treatment — and not for facially neutral rules that may disproportionately affect older workers (a complex issue expressly considered by Wirtz, for which he proposed no legislative sanction).[2]

2. *Cf. Washington v. Davis*, 426 U.S. 229, 255 (1976) (42 U.S.C. § 1981 case; it is "inappropriate simply to transfer [Title VII's adverse impact] standards . . . into a different statutory scheme having a different history") (Stevens, J., concurring).

Moreover, the adverse impact model, something of a blunt instrument even when applied to race, sex or religion (all fixed and binary characteristics) simply cannot accommodate age, a continuously and infinitely mutable variable. Applying the mechanisms of adverse impact to age produces an unworkable specie of litigation and an open invitation to just the sort of judicial micro-management of business practices against which this Court has previously warned. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices"). Although petitioners plainly are keen to have the Court ignore these practicalities, *see* Pet. Br. 10 & n.4 (asserting that it is premature to consider "judicial manageability concerns"), examining the consequences of a proposed statutory construction provides a potent "devic[e] of judicial construction [for determining a] clear sense of congressional intent." *Cline*, 124 S. Ct. at 1248. The Court will not adopt a meaning of a statute when "acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (internal citations omitted). An absurd and unworkable result is exactly what follows from petitioners' position. CELC elaborates below.

I. Congress' Treatment Of Age Discrimination And Title VII's Adverse Impact Theory Of Recovery Convincingly Show That Congress Intended No Such Theory Of Recovery Under The ADEA

A. The Secretary Of Labor Recommended, And Congress Enacted, Proscriptions Against Disparate Treatment Only

1. The Secretary of Labor's Report

At several points in the gestation of the Civil Rights Act of 1964, Congress contemplated simply adding "age" to the list of characteristics protected by that Act. *Cline*, 124 S. Ct. at 1240-41. Ultimately, however, Congress concluded that it needed more information about the differences between age discrimination and the forms of discrimination prohibited by the 1964 Act. *See EEOC v. Wyoming*, 460 U.S. 226, 229 (1983). Congress accordingly directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age. . . ." Pub. L. No. 88-352, § 715 (1964). Congress directed the Secretary to "include in [his resulting] report recommendations for legislation to prevent arbitrary discrimination in employment because of age." *Id.*

The report, delivered a year later, underscored the fundamental distinction between the problems of race, sex, and religious discrimination — addressed by the 1964 Civil Rights Act — and the "age question":

> The Nation has faced the fact . . . that . . . ability . . . is unrelated to . . . race, or color, or religion, or sex, or . . . geography. . . . Having accepted this

truth, the easy thing to do would be simply to extend [these] conclusions . . . to the problem of discrimination based on aging, and be done with the matter. This would be easy — and wrong.

Employment discrimination because of race is identified . . . with feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned.

The most closely related kind of discrimination in the non-employment of older workers involves their rejection **because of assumptions about the effect of age on their ability to do a job** *when there is in fact no basis for these assumptions.* It is this which Congress refers to, in Section 715 of the Civil Rights Act, as "arbitrary discrimination."

W. Wirtz, *The Older American Worker: Age Discrimination in Employment Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964,* at 1-2 (hereafter referred to as the "Wirtz Report") (reproduced in the Joint Appendix ("J.A.") (J.A. 36-37)) (italics in original, bold added).

This "arbitrary discrimination," the Secretary concluded, formed the most conspicuous barrier to the employment of older workers. This "most obvious kind of discrimination [typically] takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." *Id.* at 6 (J.A. 44). Thus, the Secretary concluded that a statute prohibiting disparate treatment was needed — that a "clear-cut and implemented

Federal policy against arbitrary discrimination in employment on the basis of age would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age." *Id.* at 22 (J.A. 80).

The Secretary recognized, however, that other employment practices existed "*which quite unintentionally lead to limits in hiring*," *i.e.*, practices, though fair in form and innocent in design, that nonetheless have an adverse impact on older workers. *Id.* at 22 (J.A. 80) (emphasis added). These practices, though perhaps adopted for benign, even salutary reasons, nonetheless "indirectly . . . operate[d] with some force against older workers." *Id.* at 15 (J.A. 66).

But the Secretary recommended no statutory proscription to end such practices. Instead, the Secretary recommended a variety of educational and advisory programs designed "to *encourage* new kinds of employer and union actions." *Id.* at 22 (J.A. 80) (emphasis added). Among other things, the Secretary suggested that Congress "study . . . the feasibility of a system of portable pension credits," encourage "[n]ew forms of private annuity coverage for older workers," conduct a "comprehensive formal review of the gaps and inadequacies of the present system of workmen's compensation and disability insurance," and others. *Id.* (J.A. 81).

2. The Resulting Legislation

Largely adopting the structure and content of the Secretary's suggestions, Congress enacted the Age Discrimination in Employment Act of 1967. Just as the Secretary's report had recommended, the bill contained statutory *proscriptions* on "arbitrary discrimination" against older workers, and cooperative programs and education to ameliorate the impact of employment practices "*which* . . .

unintentionally . . . limit[]" employment opportunities for those over 40. Specifically, to curb disparate *treatment* of older workers, Congress aimed "to *prohibit arbitrary age discrimination in employment*." 29 U.S.C. § 621(b) (emphasis added). As for those "institutional arrangements" that "*indirectly* . . . operate[d] with some force against older workers" — adverse impact — Congress envisioned a variety of voluntary, cooperative outreach and educational programs "to *promote* employment of older persons based on their ability rather than their age; [and] to *help* employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.*[3]

The import of this history is clear. The Secretary recognized that the problem of age discrimination has two separate dimensions. First, there existed pervasive "arbitrary discrimination" — intentional discrimination — most frequently taking the form of explicit limits on the age of acceptable applicants. For this type of disparate treatment, the Secretary recommended, and Congress enacted, an express statutory prohibition. Second, the Secretary recognized that other types of employer practices — adopted for innocent, and at times laudable reasons — nonetheless had an adverse impact on the older worker. For this problem, the Secretary recommended, and Congress adopted, a program of study, encouragement, and facilitation, intended to develop suitable alternatives to existing practices. Indeed, in a letter to the leaders of the House and Senate accompanying his legislative proposals, Wirtz explained that the bill would "provide[] for attention . . . to institutional arrangements that work to the disadvantage of older workers

3. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484 (2000) (statutory findings and articulation of purpose form a reliable guide to defining the scope of anti-discrimination legislation).

[but that] reasonable differentiations not based solely on age . . . *would not fall within the proscription*" of the legislation. 133 Cong. Rec. 1377 (1967) (Wirtz letter to J. McCormack, Jan. 23, 1967). Thus, while research "would be undertaken and promoted with a view to reducing [these institutional] barriers to the employment of older workers," *id.*, wholly absent from the statute is a private right of action to address unintentional adverse impact.

B. Congress' Treatment Of Adverse Impact Issues In The Civil Rights Act Of 1991 Demonstrates That It Did Not Intend That Theory Of Liability To Apply Under The ADEA

Congress codified the adverse impact theory for Title VII cases in the Civil Rights Act of 1991. Three aspects of Congress' consideration of that legislation help illuminate why no adverse impact theory exists in ADEA cases.

First, the dominant feature of the 1991 Act was its remaking of Title VII adverse impact theory in response to this Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Most significantly, Congress shifted the burden of proof *from the plaintiffs* — who bore the burden under settled law at the time of the Act (under *Wards Cove*) — *to the defendant* with respect to the critical "job relatedness" question. 42 U.S.C. § 2000e-2(k)(1)(A)(i). But it made this fundamental change in law of adverse impact *only as to Title VII*, even though the lower courts were then applying *Wards Cove* to ADEA cases.[4]

4. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1369-72 (2d Cir. 1989); *see also MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 771-73 (11th Cir. 1991); *Davidson v. Bd. of Governors*, 920 F.2d 441, 444 (7th Cir. 1990); *Abbott v. Fed. Forge, Inc.*, 912 F.2d 867, 873-75 (6th Cir. 1990).

Second, the CRA 1991 confirmed that judges, and not juries, were the right fact-finders to consider Title VII adverse impact cases. 42 U.S.C. § 1981a(c). But ADEA trials are jury trials. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), *codified at* 29 U.S.C. § 626(c)(2). If Congress had believed that (a) adverse impact claims were viable under the ADEA; and (b) that judges, not juries, should hear those cases, it would have amended the ADEA to say so. It amended the ADEA on *other* matters, but not on this one.

Third, the 1991 Act was enacted in the face of growing judicial skepticism about the applicability of the theory under the ADEA, initially exemplified by Chief Justice Rehnquist's opinion in *Markham,* 451 U.S. at 949 (dissenting from denial of *certiorari*), and the courts of appeals had begun to express their own doubts.[5] If Congress had intended the adverse impact theory to be available to age plaintiffs, one might have expected Congress to take the occasion to say so. This is particularly true in light of the fact that the primary animating purpose for the Act was to codify certain aspects of the theory as it applies to Title VII.

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5. *See, e.g., Arnold v. United States Postal Serv.*, 863 F.2d 994, 998 (D.C. Cir. 1988) (noting the issue and citing then-Justice Rehnquist's *Markham* opinion but declining to resolve the issue), *cert. denied*, 493 U.S. 846 (1989); *Davidson*, 920 F.2d at 444 (same); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1428 (7th Cir. 1986) ("adverse impact analysis developed in Title VII cases cannot be extended easily to age cases."); *see also Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220-21 (7th Cir. 1987) (Easterbrook, J., dissenting) (the "language, structure and history of the ADEA have led thoughtful people to conclude that disparate impact analysis is inapplicable in ADEA cases.'").

To accept petitioners' argument, then, one must be prepared to accept that Congress wanted adverse impact cases of every sort *except for age cases* to be tried to the bench, instead of to juries. And one must also accept that Congress, although animated to overrule this Court's decision in *Wards Cove* regarding the burden of proof in Title VII adverse impact cases, was content to leave *Wards Cove* as the law for such cases under the ADEA. The argument is not plausible. Petitioners — whose argument is premised largely on the notion that Congress intended the ADEA and Title VII to be treated identically for adverse impact purposes — do not explain why Congress might have desired these two statutes to be treated so differently in these two central respects. In fact, the most sensible conclusion to draw from the 1991 Act is that Congress omitted reference to ADEA adverse impact claims because it never supposed that such claims existed in the first place.

II. Age, As A Protected Characteristic, Is Fundamentally Different From Those Protected By Title VII, And Congress Could Not Reasonably Have Intended The Modes Of Proof Adopted For The Latter To Apply To The Former

A. Age Is Different

Aside from its fixation on the EEOC's guidance, the dominant theme in petitioners' brief is the refrain that the prohibitory language of the ADEA was adopted *in haec verba* from Title VII, and therefore should be given an identical reading. Although Section 4(a) of the ADEA was borrowed word-for-word from Title VII and sets out a list of "employer practices" proscribed by the statute, Section 4(f) — unique to the ADEA — *contracts* the breath of the

language of Section 4(a) by delineating a variety of lawful employment practices. Thus, only *read together* do Sections 4(a) and (f) "descri[be] the type of employer conduct that [the Act] prohibit[s]." *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 181 (1989). As the Court explained in *EEOC v. Wyoming*, 460 U.S. at 232-33, in describing Section 4(f):

> [I]n order to insure that employers were permitted to use neutral criteria not directly dependent on age . . . the Act provide[s] that certain otherwise prohibited employment practices would not be unlawful . . . "where the differentiation is based on reasonable factors other than age."

And the statutes fundamentally differ beyond their language. Title VII is premised on the conviction that native intelligence, talent and ability are not found exclusively or even primarily among any one race, color, gender, or religion, or those claiming any one national origin. Because these employment-related attributes are distributed among individuals of both genders and all racial and religious groups, we presume that when employers focus exclusively on merit, the result will be a workforce in which opportunities exist for all. As a society, we presume that there is almost never any rational connection between an individual's race or sex and the ability to perform in the workplace. Thus, the theory goes, there should be few instances in which a facially neutral employment practice bears more heavily on one religion, one gender, or one race, than another, and one may naturally be suspicious when a practice does have such an impact. That skepticism is embodied in Title VII's adverse impact mode of proof, which forces an employer to show the work-related merit of any such rule or practice when a gender or racial disparity results. The burden this sort of

analysis imposes on employers is ameliorated by the very rarity with which racial or gender disparities ought to occur.

But age is different.[6] Although the "legislative history of the ADEA repeatedly emphasize[s that] the process of psychological and physiological degeneration caused by aging varies with each individual,"[7] *on average* — as a statistical matter — there can be no denying the physiological fact that the aging process incrementally degrades human physical prowess and the acuity of the senses. *See, e.g., Vance v. Bradley,* 440 U.S. 93, 121 (1979) ("[A]ge, unlike sex, [race, or national origin,] is at some point likely to bear a relationship to ability."); *see also Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991) ("mental capacity"); *Murgia*, 427 U.S. at 317 ("physical ability"). And while the ADEA was enacted to ensure that employers would assess the capacities of their older workers on an *individualized* basis — eschewing beliefs about the *category* of older workers in favor of evidence

6. "[W]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . [O]ld age does not define a 'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process.' Instead it marks a state each of us will reach if we live out our normal span." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (citations omitted); *see also Dockins v. Benchmark Communications*, 176 F.3d 745, 749 (4th Cir. 1999) ("Thus, every individual speaks [about age] with the knowledge that there with the grace of God go I.").

7. *Cline*, 124 S. Ct. at 1244 (quoting *Western Air Lines v. Criswell*, 472 U.S. 400, 409 (1985)).

about the *individual* — non-age factors having differential age-specific impacts are "ubiquitous and inescapable." *Cunningham v. Cent. Beverage, Inc.*, 486 F. Supp. 59, 62 (N.D. Tex. 1980) (Higginbotham, J.) (citation omitted); *see also* Wirtz Report at 1-2 (J.A. 37-38) ("[T]here is in fact a relationship between . . . age and . . . ability to perform [on] the job. . . . [This relationship] *clearly does exist* so far as the age question is concerned, *but does not exist* so far as, for example, racial or religious discrimination are concerned.").[8]

Moreover, there will inevitably be correlations between (a) age and (b) experience (which typically correlates *positively* with advancing age), and facility with new technologies (which may well militate, on an aggregate basis, in favor of the young). As Judge Posner has colorfully observed, "[e]veryone knows that younger people are on average more comfortable with computers than older people are, just as older people are on average more comfortable with manual-shift cars than younger people are." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir.) (rejecting testimony of proffered statistical expert because he failed to examine relationship between "age [and] legitimate job-related qualification[s], such as familiarity with computers"), *cert. denied*, 521 U.S. 1104 (1997).

Even apart from these performance-related standards, "virtually all elements of a standard compensation package are positively correlated with age." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). Thus,

8. "The process of aging is inescapable, affecting everyone who lives long enough. It is gradual, minimizing and obscuring differences among people." Wirtz Report at 6 (J.A. 44).

when an employer acts to trim costs — sometimes a painful necessity for a business — adverse impact on more senior (and therefore likely older) workers is all but inevitable. *See, e.g., id.* at 1164-65 (reducing maximum vacation allowance had an adverse impact on older workers, as would across-the-board pay cuts); *EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 743 (E.D. Pa. 1985) (salary caps adversely affected senior, and therefore older, teachers); *see also Metz*, 828 F.2d at 1214 (Easterbrook, J., dissenting) (decision to "close a plant or curtail its operations because of high wage costs" would have impact on older workers). Consider an employer that needs to cut $200,000 from its payroll. It can either cut (a) one $200,000 job; (b) two $100,000 jobs; or (c) eight $25,000 jobs. Seeking to minimize the number of job losses, and without ever even thinking about the ages of the incumbents in those jobs, the employer may well opt for either plan (a) or (b). Petitioners' theory would put the employer at legal jeopardy if, as likely would be the case, the highest-salaried jobs are held by older workers.[9]

Unlike with Title VII, where racial, religious, or gender disparities are presumed to be both few and inherently suspicious, age-correlated disparities in the workplace are almost certain to be both innocent and commonplace — a fertile growth medium for adverse impact litigation. Attempting to downplay this ominous fact, petitioners

9. In the instant case, similarly, respondents allocated more of its available funds for pay increases for police officers to its junior officers, whose pay respondents concluded was below-market, rather than to its most senior, and therefore highest paid, officers, for whom no market-based disparity existed. Because the senior officers were relatively older than the junior officers, petitioners alleged that the decision was proscribed by the ADEA.

reassuringly predict that the success rate of plaintiffs in ADEA adverse impact cases will be relatively low "because the impact of neutral policies which fall disproportionately on class members protected by the ADEA can be proven to be related to legitimate business reasons in more instances than those which might impact other protected groups." Pet. Br. 10 n.4 (citations omitted).

One might reasonably wonder why Congress would have felt it necessary to adopt so far-reaching a theory of recovery for the ADEA with the expectation that employers would almost always win when those cases were brought. This is particularly true in light of the fact that the "*essence* [of the evil] Congress sought to prohibit in [passing] the ADEA" was disparate *treatment*.[10] Petitioners would ascribe to Congress a secondary, non-"essential" purpose of attaching legal jeopardy to — and hence effectively proscribing — a set of facially benign practices through an enormously burdensome and expensive form of litigation that plaintiffs almost never would win.

And even if it were true that defendants usually would win on the merits, litigation is costly, and class litigation can be ruinously so. The potential damages in a discrimination class action can push defendants to settle even the weakest of claims. *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (pressure to settle class claims can be almost irresistible "even when the plaintiff's

10. *Cf. Gen. Bldg. Contractors Ass'n v. Penn.*, 458 U.S. 375, 387-88 (1982) ("The immediate evils with which the Thirty-ninth Congress was concerned simply did not include practices that were 'neutral on their face'"; "To infer that Congress sought to accomplish more than this would require stronger evidence in the legislative record than we have been able to discern").

probability of success on the merits is slight.") *See also* Advisory Committee Notes to 1998 Amendments to Fed. R. Civ. P. 23(f) (threat posed by class litigation can "force a defendant to settle rather than incur the costs of defending . . . and run the risk of potentially ruinous liability"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 163-64 (3d Cir. 2001) (noting "hydraulic" pressure to settle).

No matter what result the defendant theoretically could obtain in court, the specter of these cases — even when the employer could "win" — means massive distraction and disruption to the mission of the enterprise. Under these circumstances, repeated defense "victories" would be Pyrrhic. Absent clear direction from Congress (not present here), the Court should be reluctant to adopt a construction of the statute that essentially guarantees that everyone comes out a loser.

B. Unlike The Characteristics Protected By Title VII, An "Age Class" Would Be Malleable And Subject To Gerrymandering, Making An Employer's Task In Avoiding, Or Defending, Litigation Almost Impossible

Conceptually at least, it is a relatively simple matter to determine whether a rule has an adverse impact on members of one gender, race, or religion.[11] Because these characteristics are binary in nature — *e.g.*, one is either female or not — it

11. As a practical matter, of course, such an analysis can be exceptionally challenging. Any competent regression analysis must account for the major non-discriminatory factors that influence employee success, and many, perhaps even most, of those will be impossible to quantify in a way that makes them susceptible to statistical analysis. *See Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 995-97 (1988).

is relatively straightforward to compare the success rates of those within the protected group to those outside the group.

Age is not so simple. Ages are infinitely variable and constantly changing. Attitudes towards those over 80 are substantially different than towards those aged 40-45. Rather than a "discrete and insular" minority, old age refers simply to "a state each of us will reach if we live out our normal span." *Murgia*, 427 U.S. at 313-14; *see also Dockins*, 176 F.3d at 749. With a large and complex piece of class litigation, many of those of the "favored" age at the inception of the case may well be within the *disadvantaged* group by the time a case gets to trial.

This fluidity would pose significant complexities for class litigation. How does one define the group harmed? The statistics may suggest an employer's practice has an adverse impact on employees over 52, but not on those between 40 and 52. *See, e.g., Lowe*, 886 F.2d at 1373. Or, the statistics may show disadvantage to those between the ages of 52 and 59 when compared to younger workers, but that those *over* the age of 59 are treated *favorably*. Although this pattern — with the oldest workers receiving the most favored treatment — cannot be age discrimination in any sense that Secretary Wirtz, or the 88th Congress, would have recognized, the EEOC has insisted in litigation that the Act provides for precisely this sort of "banding," *i.e.*, that the Act allows a plaintiffs' counsel to manipulate the statistics until he or she finds an age cohort that is less well off when compared to some other, younger cohort. *See, e.g., EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950-51 (8th Cir. 1999). Thus, an adverse impact case would be available to "redress" a disparity observed between, for example, the treatment of those age 51½ years old through age 56 when compared to

those under 40, even when the over-40 protected class as a whole is treated favorably. As the Second Circuit observed in *Lowe*:

> Under this approach, . . . any plaintiff can take his or her own age as the lower end of a "sub-protected group" and argue that said "sub-group" is disparately impacted. If appellants' approach were to be followed, an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the "sub-group" of those age 85 and above, even though all those hired were in their late seventies. . . . We find no support in the case law or in the ADEA for the approach to disparate impact analysis appellants advocate.

886 F.2d at 1373.[12]

No circuit has yet adopted the EEOC's conception of the adverse impact theory, but the alternative adverse impact approach is no better. The alternative adopted by some courts has been to treat age artificially as a binary characteristic like gender, *i.e.*, to ask simply whether those age 40 and over,

12. As the Court has previously warned in its Title VII cases, the focus in adverse impact claims on statistical balance makes it all too attractive for employers to insulate themselves from liability by adopting quotas forbidden by the statute. *See Wards Cove*, 490 U.S. at 652-53; *Watson*, 487 U.S. at 992-94. Were the Court to adopt the EEOC's specie of adverse impact analysis to claims under the ADEA, even this stratagem would be unavailable; employers would have to ensure that employment opportunities were allocated proportionately to those of every age — 48 year olds, 49 year olds, 50 year olds, on through to its most senior employee. Even the most quota-oriented employer could not make these numbers work.

as a block, have been treated less well than those under 40. *See, e.g., Lowe*, 886 F.2d at 1373; *McDonnell Douglas Corp.*, 191 F.3d at 950-51. But "the ADEA prohibits discrimination on the basis of age and *not class membership*." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (emphasis added). "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*." *Consolidated Coin*, 517 U.S. at 312 ("to put it concretely, there can be no greater inference of *age* discrimination (as opposed to '40 or over' discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.") (emphasis in original).[13]

Under this approach, a group of plaintiffs could make out an adverse impact claim where an employer's practices give substantial *preferential* treatment to those over 50, so long as there are enough adversely treated employees between 40 and 50 to make the entire over-40 protected class *appear* less well off than those under 40. This cannot be; just last Term, this Court held in *Cline* that the Act protects older workers from relative disadvantage at the expense of the younger, but that the converse is *not* true. A conception of the Act that would find discrimination where the oldest workers are *favored* cannot be reconciled with the rule in *Cline*.

In sum, those determined to force fit the adverse impact theory into the ADEA have two equally unappealing

13. *See also Cline*, 124 S. Ct. at 1244 (explaining the Court's "consistent understanding that the text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young [persons over the age of 40 complaining about favorable treatment of still older individuals] outside the statutory concern").

alternatives: treat the 40-and-over group as an undifferentiated mass (and thereby treat as age discrimination certain statistical arrays that plainly show no adverse impact against *older* workers in the sense contemplated by *Cline*), or permit plaintiffs to slice and dice the employer's age cohorts until they find a band — and, without rigorous management-by-quota they often will — that, statistically, failed to get its share of whatever benefit is at issue.[14] Either interpretation would do violence to the Court's prior cases and to the evident concerns that motivated Congress.

III. In ADEA Adverse Impact Cases, There Would Be A Particular Danger That Juries Would Second Guess Employer Business Judgment; Congress Did Not Intend This Result

In Title VII cases (and presumably under the ADEA if the Court were to reverse the court of appeals here), an employer can lose an adverse impact case even when its business practices have been shown to be "job related" and "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Watson*, 487 U.S. at 1005-06 (Blackmun, J., concurring). Plaintiffs win if they can "show that other [alternative practices rejected by the employer], without a similarly undesirable . . . effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

14. Few employers have access to the sort of sophisticated statistical expertise needed to run the universe of regression analyses a plaintiffs' counsel might seize upon. This is especially true for small businesses (the ADEA covers all employers with more than 20 employees).

. This aspect of the adverse impact doctrine has always been problematic for employers, because without careful limits, it naturally would lead to a degree of judicial second-guessing as to which alternatives really might have been equally effective in serving the employer's "legitimate interests." But this Court has cautioned the lower courts that they "are generally less competent than employers to restructure business practices, [and therefore] the judiciary should proceed with care before mandating that an employer . . . adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit." *Wards Cove*, 490 U.S. at 660-61 (quoting *Furnco*, 438 U.S. at 578). The relevant reported cases appear to reflect that the courts have implemented this guidance with prudence and restraint.[15]

But, as noted above, Title VII adverse impact cases — and thus the "alternative practices" inquiry — are tried to federal district judges, not the juries that would hear ADEA claims. And because hard economic choices often will impact high-wage (and presumably more senior) workers disproportionately, an ADEA disparate impact theory would mean that employers would repeatedly be put to the task of explaining their business rationale to juries, even for the most intractable business problems that have no "right" solution. *See, e.g., Metz*, 828 F.2d at 1214 (Easterbrook, J., dissenting) (decision to "close a plant or curtail its operations because of high wage costs" would have an adverse impact on older workers). Should the employer have taken across-the-board

15. *See Watson*, 487 U.S. at 999; *see also Hack v. President & Fellows of Yale College*, 237 F.3d 81, 101 n.18 (2d Cir. 2000), *cert. denied*, 534 U.S. 888 (2001); *Holder v. City of Raleigh*, 867 F.2d 823, 828 (4th Cir. 1989); *Bernard v. Gulf Oil Corp.*, 890 F.2d 735, 744 (5th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *Worthy v. United States Steel Corp.*, 616 F.2d 698, 704 (3d Cir. 1980).

pay cuts rather than trimming salaries for its highest-cost (and oldest) workers? Should it have increased medical insurance co-payments or should it have eliminated signing bonuses for on-campus recruits instead? Should the company have closed the local plant or the one in the next state, or the next time zone? Would it have been wiser to keep jobs in a restructuring (rather than subcontracting), if the cost difference could have been bridged by selling the executive jet and canceling some TV advertising? The Third Circuit has examined the problem:

> [I]f an employer set the work week at five days per week, eight hours per day, or if it determined to eliminate medical insurance coverage, its decisions could have a disparate impact on older employees. In that circumstance, in an ADEA action *employers would be forced to justify their business practices with older employees then having the opportunity to demonstrate that alternative employment practices could fulfill the employer's needs. Such a regime could subject employers to unreasonable intrusions by juries into their business practices.*

DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 734 n.21 (3d Cir. (internal citations omitted) (emphasis added), *cert. denied*, 516 U.S. 916 (1995).

Although a jury can be instructed that a disparity must be proven — that they may not "vault over the initial inquiries and rest [their verdict] entirely on the existence of alternatives," *Price v. City of Chicago*, 251 F.3d 656, 660 (7th Cir. 2001) — juries fed on popular press accounts of exorbitant CEO pay and executive malfeasance will be

tempted to look past disputed evidence about the existence of statistical disparities and move straight to the question whether more "equitable" alternatives to hard business choices existed. They will be hard pressed to refrain from "restructuring the employer's business practices," even where no convincing evidence of a disparity exists. There is simply no evidence that Congress intended the ADEA to serve as the sort of blunt instrument of social and economic policy petitioners urge on the Court.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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AZEL P. SMITH, et al.,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI and POLICE DEPARTMENT OF THE CITY OF JACKSON, MISSISSIPPI,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. The *Griggs* Rationale Does Not Extend To Employment Decisions Affecting Older Workers. . 4

A. Age Discrimination Fundamentally Differs From Race Discrimination. 6

B. The Court's Contemporary Framework For Statutory Construction Precludes Creation Of A Disparate Impact Claim 8

II. Congress Intended The ADEA To Proscribe Only Age-Motivated Discriminatory Conduct. 9

A. The Language Of Section 623(a) Proscribes Only Disparate Treatment 10

B. Section 623(f)(1) Confirms That The ADEA Does Not Proscribe Disparate Impact. 16

1. The Meaning Of "Otherwise Prohibited" In § 623(f)(1) Derives From The Legal Context Of The ADEA's Enactment .. 18

2. The RFOA Clause Is Not An Affirmative Defense 21

3. The Word "Reasonable" In The RFOA Clause Does Not Imply The Concept Of "Business Necessity." 23

C. Legislative History Shows Congress' Intent To Tailor The ADEA To Address The Specific Qualities Of Age Discrimination 26

D. The EEOC's Interpretive Guidelines Cannot Create A Disparate Impact Claim. 30

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Alexander v. Sandoval,
532 U.S. 275 (2001) 8

DiBiase v. SmithKline Beecham Corp.,
48 F.3d 719 (3d Cir. 1995) 12, 17, 29

EEOC v. Wyoming,
460 U.S. 226 (1983) 6

Ellis v. United Airlines, Inc.,
73 F.3d 999 (10th Cir. 1996)..... 5, 9, 10

Gen. Dynamics Land Sys., Inc. v. Cline,
124 S. Ct. 1236 (2004) 4

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) ..... *passim*

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) ..... *passim*

Hiatt v. Union Pacific R.R. Co.,
859 F. Supp. 1416 (D. Wyo. 1994) 28

J.J. Case Co. v. Borak,
377 U.S. 426 (1964) 8

Kirby v. Colonial Furniture Co.,
613 F.2d 696 (8th Cir. 1980)..... 29

Lewis v. Young Mens Christian Association,
208 F.3d 1303 (11th Cir. 2000) 20

Marshall v. Westinghouse Electric Corp.,
576 F.2d 588 (5th Cir. 1988) 21

Massachusetts Board of Retirement v. Murgia,
427 U.S. 301 (1976) 28

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 4, 11, 19, 26

McKennon v. Nashville Banner Publishing Co.,
513 U.S. 352 (1995) 11

Mullin v. Raytheon Co.,
164 F.3d 696 (1st Cir. 1999) 5, 6, 17, 28

Pavlo v. Stiefel Laboratories, Inc.,
Civ. No. 78-5551, 1979 WL 105
(S.D.N.Y. Nov. 27, 1979) 5

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 10, 19

Public Employees Retirement System of Ohio v. Betts,
492 U.S. 158 (1989) 22

Texas Department of Community Affairs v. Burdine,
450 U.S. 248 (1981) 11

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 8

United Air Lines v. Evans,
431 U.S. 553 (1977) 15

United States v. Mead Corp.,
533 U.S. 218 (2001) 30

Washington v. Davis,
426 U.S. 229 (1976) 6

Williams v. City and County of San Francisco,
483 F. Supp. 335 (N.D. Cal. 1979) 5

FEDERAL STATUTES AND REGULATIONS

29 C.F.R. § 1625.7(d) 30

29 U.S.C. § 621 ..... 2, 26

29 U.S.C. § 622 27

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Pub. L. No. 88-352, 78 Stat. 265 ..... 1, 7

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Pub. L. No. 102-166, 105 Stat. 1071 19

Older Workers Benefit Protection Act of 1990,
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MISCELLANEOUS

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) 10, 13, 14, 24

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 36 (1967) 2

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INSTANT ENGLISH HANDBOOK (1993 ed.) 11

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The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965)..... 7

113 CONG. REC. 1,377 (1967) 20, 22

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136 CONG. REC. 13,596-97 (1990)..... 23

H.R. REP. 101-664 (1990)..... 23

S. REP. No. 101-263 (1990)..... 23

46 Fed. Reg. 47,724 –27 (1981) 30

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents a membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in hundreds of cases before the United States Supreme Court and the Courts of Appeals, including numerous employment discrimination cases.

The Chamber fully endorses the Age Discrimination in Employment Act. Reliance on age stereotypes about the abilities of older workers should not be tolerated. Due to natural job progression, however, age is often correlated with job terms such as compensation, pension, and seniority. In this context, and where Congress did not so intend, imposing a burden on employers to justify the business necessity of routine and uniform job standards that statistically impact older workers is unjustified.

SUMMARY OF THE ARGUMENT

The disparate impact theory, first recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a race discrimination case under Title VII of the Civil Rights Act of 1964, does not apply to age discrimination claims. When Congress passed Title VII, it expressly recognized that age discrimination differs from other forms of discrimination.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part, and no one other than *amicus curiae*, its members, or counsel made a monetary contribution to the brief's preparation or submission. S. Ct. R. 37.6.

Weighing in Congress' effort to balance employees' and employers' interests in any age legislation was the reality that "a person's age catches up to him" and "diminishes his capacity and competence." *See Age Discrimination in Employment: H'gs on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 36, 37 (1967) [hereinafter "*Senate Hearings*"]. This had no analogue in Congress' consideration of invidious racial prejudice under Title VII. Therefore, Congress directed the Secretary of Labor to assess whether legislation was necessary to "prevent arbitrary discrimination in employment because of age." Civil Rights Act of 1967, Section 715.

Based on the Secretary of Labor's recommendations, Congress enacted the Age Discrimination In Employment Act (ADEA) and designed its proscriptions to redress only "arbitrary discrimination," s*ee* 29 U.S.C. §§ 621, 623, which resulted from inaccurate and stigmatizing age stereotypes. Congress decided that other factors adversely affecting older workers' employment were more suitably addressed by education and training programs.

In *Griggs*, the Court adopted the disparate impact theory, but the Court grounded that theory in the purpose or objective of Title VII rather than in any specific statutory language. The Court subsequently extended the theory to other Title VII contexts, to redress institutional or societal bias that has produced "built-in headwinds," "glass ceilings," or "barriers" to the advancement of protected groups. The Court has not, however, extended the disparate impact theory to claims under the ADEA. That is not surprising.

Unlike groups protected by Title VII, older workers have not suffered from lifelong barriers to advancement due to the perpetuation of effects of historical discrimination. Rather, as Congress recognized in passing the ADEA, older

workers are affected by stereotypes that develop only as age progresses. The disparate treatment theory, which focuses on motive, is specifically designed to test for age stereotyping, and it is the sole cause of action intended by Congress. This Court's reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), leads directly to this result.

Under the language of the ADEA, an inquiry into motive is necessary and the most suitable means to root out age stereotyping. Reading motive out of the ADEA to allow disparate impact claims would upset the balance struck by Congress. If such claims were available, statistical correlation—having nothing to do with motive—would become dispositive, subject only to the employer's proof of business necessity. Employers, though not motivated by age, would be forced to justify the business necessity of considering factors such as seniority or pay which, because they correlate with age, may have a statistical impact on older workers.

Because age-motivation is required by the language of the statute, and is an element only under the disparate treatment theory, the disparate impact theory is not cognizable under the ADEA. Although an EEOC guideline purports to create an ADEA disparate impact claim, it is contrary to the statute's language. Neither as originally enacted nor as amended does the ADEA include a disparate impact claim.

ARGUMENT

Petitioners' argument that the ADEA authorizes disparate impact claims relies on the similarity in language between the ADEA's liability provision at 29 U.S.C. § 623(a)(2) and Title VII's liability provision at 42 U.S.C. § 2000e-2(a)(2), which this Court cited in *Griggs* when it first recognized the disparate impact cause of action. Pet. Br. 11-

17, 22, 36. As the Court recently emphasized, however, the presumption that the same words have the same meaning—even when used in the *same* statute—is not irrefutable. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1245-46 (2004). In fact, the presumption "is not rigid" and will yield when there is reason to believe that Congress intended the words to have different meanings. *See id.* at 1245. That is even more so when the words are used in different statutes addressing different problems. Although § 623(a)(2)'s language admittedly is the same as the Title VII language cited in *Griggs*, other textual provisions as well as the background of both statutes and the rationale underlying *Griggs* show that the statutes should be interpreted differently.

I. The *Griggs* Rationale Does Not Extend To Employment Decisions Affecting Older Workers.

In *Griggs*, a Title VII case alleging race discrimination, this Court first articulated the disparate impact cause of action. Duke Power had openly segregated job titles by race prior to the effective date of Title VII. 401 U.S. at 427. Upon enactment of Title VII, it adopted a policy requiring a high school diploma or passing scores on two aptitude tests for placement into higher paying jobs. These requirements disparately affected African-American employees. The Court found that the disparate effect was "directly traceable to race," because the long history of societal racism and inferior education in segregated schools had deprived many black employees of the means to manifest their true abilities through standardized tests. *Id.* at 430-31; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens…not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."). Because the employer's job requirements operated "to 'freeze' the status

quo of prior discriminatory employment practices," and worked as "built-in headwinds" for the advancement of minority groups, the Court held that the requirements were unlawful if not proven to be job-related. *Id.* at 430-32; *id.* at 431 ("The touchstone is business necessity. If an employment practice cannot be shown to be related to job performance, the practice is prohibited."). Proof of a discriminatory motive was not necessary.

Griggs was not decided until after the ADEA was enacted. *Griggs* therefore could not have informed Congress' judgment in drafting the ADEA. Overlooking this point, along with *Griggs'* focus on the perpetuation of past discrimination, several courts of appeals had simply assumed that the disparate impact theory was available to ADEA plaintiffs. *See* Pet. Br. 35 n.20 (citing cases). Contrary to Petitioners' assertion (Pet. Br. 35), however, this view did not go unquestioned. *See Pavlo v. Stiefel Labs., Inc.*, Civ. No. 78-5551, 1979 WL 105, at *9 n.22 (S.D.N.Y. Nov. 27, 1979) (questioning *Griggs'* applicability to the ADEA); *Williams v. City and County of S.F.*, 483 F. Supp. 335 (N.D. Cal. 1979).

In 1993, this Court's reasoning in *Hazen Paper*, which focused on congressional intent and the difference between age and other forms of discrimination, strongly pointed toward the conclusion that the disparate impact theory is not available under the ADEA. *See* 507 U.S. at 609-11; *Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (1st Cir. 1999) (*Hazen*'s "inescapable implication" is that disparate impact would not address evils that ADEA was designed to eliminate); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996) (*Hazen* gives "strong impression" that the ADEA does not encompass a disparate impact claim). The Court held that an employment decision that is motivated by a factor that merely correlates with age, but is analytically distinct from age, does not violate the statute. The Court reasoned that, because the impetus of the ADEA was

Congress' "concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," disparate treatment—with its focus on motive—"captures the essence of what Congress intended to prohibit." *Id.* at 610. When the employer is motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. *Id.* at 611.

Hazen Paper made clear that the ADEA is a different statute with a different history and purpose than Title VII. The disparate impact theory should not be mechanically transplanted into the ADEA without first reexamining *Griggs*' rationale in light of those differences. *Mullin*, 164 F.3d at 701 (divergence in purpose between Title VII and ADEA counsels against mechanistic adherence to *Griggs*); *see Washington v. Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring) (inappropriate simply to transplant Title VII standards into a different statutory scheme having a different history). *Griggs*' rationale is not applicable to the ADEA for two reasons, discussed below. First, *Griggs*' policy justification for developing the disparate impact theory was aimed at invidious race discrimination and is not transferable to the ADEA context. Second, the policy-based interpretation of Title VII that underpins *Griggs* was not derived from a strict focus on the statutory text and structure and, under this Court's more recent statutory construction cases, should not be extended beyond the setting in which it was first adopted.

A. Age Discrimination Fundamentally Differs From Race Discrimination.

Although the purpose of both the ADEA and Title VII is to eliminate discrimination in the workplace (Pet. Br. 25), the realities of race and age discrimination differ substantially. During the debates on Title VII, proposals were made to include age discrimination within its prohibitions. *EEOC v. Wyoming*, 460 U.S. 226, 229-30 (1983). Such

legislation was deferred, however, because Congress had too little information to make a considered judgment about the nature of age discrimination. *Id.* Suspecting that age differed fundamentally from race and other types of discrimination, Congress directed the Secretary of Labor to study the causes and effects of age discrimination and to prepare a report and recommendations on the need for (and scope of) any age legislation. The Secretary of Labor subsequently issued *The Older American Worker: Age Discrimination In Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965) (the "Labor Report").

Unlike race discrimination, the Report found "no evidence of prejudice based on dislike or intolerance of the older worker." Labor Report at 6; *id.* at 2 ("discrimination" based on age "means something very different" than race discrimination). According to the Report, age-based intolerance is unusual because the process of aging "is inescapable, affecting everyone who lives long enough," and people of all ages "liv[e] in close association rather than in separate and distinct social or economic environments." *Id.* at 6. Thus, "age" is not a restricted class in which segregation and lack of association with other groups may breed rigid biases, such as the racial prejudice confronted in *Griggs*. The Report also found that some work-related abilities do correlate with the inevitable process of aging and that this further distinguishes age from other characteristics like race or ethnicity.[2] Thus, adverse assumptions about older

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[2] *See* Labor Report at 2 (identifying acts not appropriately called "discrimination," such as "decisions not to employ a person for a particular job because of his age when there is in fact a relationship between his age and his ability to perform the job"); *Senate Hearings* at 39 (statement of Secretary of Labor) (challenge in age legislation was drawing a distinction between cases in which age is relevant to

employees' abilities, if examined, sometimes will prove true. Examples noted by the Labor Report include chronic illness, less education, less mobility, lack of transferability of job skills and experience to meet new technology, and less proficiency in testing. Labor Report at 11-15. Therefore, the virtually irrefutable presumption of equaling that is at the core of the legislation prohibiting racial discrimination is not applicable to people in different age groups.

B. The Court's Contemporary Framework For Statutory Construction Precludes Creation Of A Disparate Impact Claim.

The Court has increasingly emphasized that the interpretation of a statute must begin with its text. *See Alexander v. Sandoval*, 532 U.S. 275, 286-88 (2001) (delineating evolution of statutory construction from *J.J. Case Co. v. Borak*, 377 U.S. 426 (1964) to *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979)). The focus of statutory interpretation has shifted away from a generalized study of the purpose or spirit of an Act to a progressively sharper inquiry into congressional intent through an Act's language, structure, and legislative history. *See Touche Ross*, 442 U.S. at 578 ("[G]eneralized references to the 'remedial purposes' of the [statute] will not justify reading a provision more broadly than its language and statutory scheme reasonably permit."). A contemporary interpretation of the ADEA should follow the same framework. *See Alexander*,

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employment capacity and those in which it is not); *Senate Hearings* at 36, 37 (statement of Secretary of Labor) (it is an accepted part of the employment relationship "that when 'a person's age catches up to him' and diminishes his capacity and competence, he must accept the fair-minded economic judgment of those he works for…that his value has fallen below the break-even point").

532 U.S. at 287 (rejecting argument that statutes enacted prior to *Cort v. Ash*, 422 U.S. 66 (1975), should be interpreted within their own contemporary legal context). Before extending the disparate impact theory of *Griggs* to another statute, therefore, the Court should take into account not only the differences in context between race and age discrimination, discussed above, but also *Griggs*' emphasis on the "objective" and "thrust" of Title VII rather than on its text as a basis for determining congressional intent. *Griggs*, 401 U.S. at 429 ("objective" of Congress in enacting Title VII); *id.* at 432 ("thrust" of the Act directed to the consequences of employment actions).[3]

II. Congress Intended The ADEA To Proscribe Only Age-Motivated Discriminatory Conduct.

Petitioners primarily argue that, because *Griggs* interpreted Title VII to include the disparate impact theory, similar language in the ADEA must have the same meaning. Pet. Br. 11-17. As fundamental as the presumption that similar language is construed similarly, however, is the "cardinal rule that '[s]tatutory language must be read in context [since] a phrase 'gathers meaning from the words around it.'" *Cline*, 124 S. Ct. at 1246. A review of the ADEA as a whole demonstrates that Petitioners are wrong in assuming that the liability provisions of Title VII and the

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[3] Petitioners exaggerate the extent to which *Griggs* "expressly rel[ied] on the text of Title VII." Pet. Br. 22. The Court's citation of 42 U.S.C. § 2000e-2(a)(2) in a footnote constituted its entire reliance on the text of the statute. *Griggs*, 401 U.S. at 426 n.1; *see Ellis*, 73 F.3d at 1007 n.13 (*Griggs* was not based on Title VII's text, but looked primarily to its larger objectives); George Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688, 724 (1979-80) ("The legal and moral force of *Brown v. Board of Education* has caused the federal courts to favor claims of racial discrimination, most significantly through judicial creation of the theory of disproportionate adverse impact.").

ADEA are identical. Liability under the ADEA is determined by both § 623(a) and § 623(f)(1)—the latter of which has no counterpart in Title VII. This difference "creates a critical 'asymmetry' between the ADEA and Title VII," which shows that the statutes should not be interpreted identically. *Smith*, 351 F.3d at 190-91. For the reasons below, § 623(a)(2) requires a showing of age-motivation.

A. The Language Of § 623(a) Proscribes Only Disparate Treatment.

The language of § 623(a)(2) confirms what *Hazen Paper* implied: Age-motivation is a required element of a cause of action under the Act. The Section reads as follows:

> It shall be unlawful for an employer…to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2). Section 623(a)(2) prohibits conduct taken "because of" such individual's age, which means "on account of" or "by reason of" age. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 159 (4th ed. 2000). This language requires age-motivation.[4] Age-motivation is

[4] D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. Cal. L. Rev. 733, 739, 751 (1987) [hereinafter "Welch, *Removing Barriers*"] (the phrase "because of" reflects motive); *Ellis*, 73 F.3d at 1007 (most obvious reading of "because of such individual's age" is that it prohibits an employer from intentionally discriminating); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 281-82 (1989) (Kennedy, J., dissenting) ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.").

the linchpin of disparate treatment claims;[5] disparate impact cannot be used as a surrogate.[6] Consequently, the only reasonable reading of § 623(a)(2) is that it proscribes disparate treatment.

In an attempt to force disparate impact into the meaning of § 623(a)(2), Petitioners argue that the key prepositional phrase "because of such individual's age" modifies the verb "affect," rather than the earlier verbs "to limit, segregate, or classify." Pet. Br. 23. Petitioners' position is inconsistent with normal English usage. The comma immediately preceding the "because of" phrase signals that the phrase is out of its natural order. INSTANT ENGLISH HANDBOOK 276 (1993 ed.) (a comma typically is not used after an adverbial dependent clause). Instead, the

[5] *Hazen Paper*, 507 U.S. at 610-11 (liability in a disparate treatment case depends on whether the protected trait motivated the employer's decision). Although the phrase "intent to discriminate" often has been used in ADEA and Title VII cases, the Court has made clear that it means "motivated" by a protected trait. *E.g., McDonnell Douglas*, 411 U.S. at 802 (emphasizing the employer's reason and the question of "racial motivation"); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) (using term "intentional discrimination" but focusing on employer's "reasons"); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (focusing on "motive"); *see* Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 766-72 (despite courts' use of the term "intent," the ultimate issue in disparate treatment is motivation).

[6] *Raytheon Co. v. Hernandez*, 124 S. Ct. 513, 519 (2003) (because the factual issues and character of the evidence differ between the disparate impact and disparate treatment theories, "courts must be careful to distinguish between these theories"). The disparate impact theory eliminates motive as a material issue. If, as we argue, a showing of motive is required under the ADEA, disparate impact alone cannot create liability. *Hazen Paper*, 507 U.S. at 610 (a disparate treatment claim fails unless the employee's protected trait had a determinative influence on the outcome).

comma signals that the phrase "because of" is out if its natural order. *Id.* at 281; *see also* Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 843 n.27 (1982) [hereinafter "Krop, *Age Discrimination*"] (grammatical construction of § 623(a)(2) should be interpreted to allow only disparate treatment); *DiBiase*, 48 F.3d at 733-34 (relying on Krop's grammatical analysis). Thus, the phrase "because of such individual's age," should be read to modify "to limit, segregate, or classify." This construction requires a showing of age-motivation and authorizes only claims of disparate treatment. Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843.

To counter this conclusion, Petitioners argue that, since the singular noun used in the phrase "because of such *individual's* age" does not match the plural form used in "to limit, segregate, or classify his *employees*," the former must not modify the latter. Pet. Br. 23-24. The better reading is to interpret use of the singular noun "individual" as reflecting congressional intent to create a standing requirement by restricting claims of age discrimination to persons who actually were adversely affected by the discriminatory practice. Making it unlawful to limit, segregate, or classify employees in a way that would deprive any of them of employment opportunities because of age could be interpreted to authorize a person who was not actually subjected to the unlawful practice to bring a lawsuit. It is clear that Congress meant to preclude this result.[7]

[7] Although, since the 1972 amendments to Title VII, an individual can file a charge "on behalf" another, the amendments did not change Title VII's requirement that only the actual victim of discrimination can receive a right-to-sue notice and file a civil lawsuit. *See* 42 U.S.C. § 2000e-5(f)(1) (notice of right to sue shall be given to "the person aggrieved," after which "a civil action may be brought…by the person

Petitioners' further insistence (Pet. Br. 22) that the phrase "because of" does not typically refer to an actor's state of mind but instead means causation is misguided. As discussed above, the phrase "because of" is routinely interpreted to refer to motive. Although "[m]otive is a causal concept,"[8] in legal parlance, motive typically refers to a subjective state of mind.[9]

Petitioners contend that, if Congress truly meant to require a subjective showing of age-motivation, it would have used a term such as "willful," "knowing," "deliberate," or "malice." They argue, for example, that Congress could have used words more akin to 42 U.S.C. § 1981a(b)(1)'s requirement of "malice" or "reckless indifference" to prove liability for punitive damages. But these states of mind differ from motive. *See Kolstad v. Am. Dental Ass'n,* 527 U.S. 526,

claiming to be aggrieved"). The same is true for the ADEA. 29 U.S.C. § 626(c)(1) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction …"). The language in § 623(a)(2) focusing on the "individual" ensures proof not just of a policy to segregate because of protected status, but also proof that the practice adversely affected the individual bringing the lawsuit. *See Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 159 n.15 (1982) ("Title VII prohibits discriminatory practices, not an abstract policy of discrimination.").

[8] Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 739; AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1148 (4th ed. 2000) ("motive" is an "emotion" or "desire" "that acts as an incitement to action"; "causing or able to cause motion")

[9] *E.g., U.S. v. Cintolo*, 818 F.2d 980, 1000 (1st Cir. 1987) ("Motive is, by definition, subjective in nature; it is a state of mind that is shown by proving the emotion that brings it into being."); *U.S. v. LaRouche Campaign*, 695 F. Supp. 1265, 1271 (D. Mass. 1988) (in legal discourse, "motive" concerns reasons for desiring certain consequences and is a state of mind).

536 (1999) (showing of intentional discrimination does not necessarily give rise to punitive damages liability under the "reckless indifference" standard). Similarly, liability based on "knowledge" would penalize a foreseeable outcome irrespective of the employer's motivation. Because Congress intended instead to require a showing of motive, it used the suitable phrase "because of."

Furthermore, use of the particular terms "limit," "segregate," or "classify" prior to the phrase "because of such individual's age" supports an interpretation of § 623(a)(2) that prohibits only age-motivated practices. These terms all suggest that the conduct Congress sought to address were express age-based categorizations that adversely affect older workers. The verb "limit" means "[t]o confine or restrict within a boundary or bounds." THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 1016 (4th ed. 2000). "*Limit* refers principally to the establishment of a maximum beyond which a person or thing cannot or may not go." *Id.* The verb "segregate" means to "separate or isolate from others," "to impose the separation of (a race or class) from the rest of society," and to "practice a policy of racial segregation." *Id.* at 1577. The verb "classify" means to "arrange or organize according to class or category." *Id.* at 343. All of these terms essentially mean "discrimination," and do not connote facially neutral practices that coincidentally have adverse effects on a protected group.

"Segregate," for example, makes no sense unless there is some definition of one class that is separated or isolated from the others. "Segregate" makes most sense when linked to the subsequent phrase—"because of such individual's age"—which defines the relevant classes. The

same is true for "limit" and "classify."[10] As Petitioners repeatedly note, Congress borrowed the language in § 623(a)(2) from Title VII. Title VII's historical context—in which school segregation by race, for example, and express sex and race-based job classifications prevailed—clarifies what conduct Congress sought to remedy when it prohibited employers from, for example, segregating employees because of race in a way that deprives particular individuals of job opportunities. *See Griggs*, 401 U.S. at 427 (segregation of departments by race); *United Air Lines v. Evans*, 431 U.S. 553 (1977) (no-marriage rule applied only to female employees). This understanding applies equally to the ADEA, which sought to eliminate these kinds of express age "limits" and "classifications," which frequently were used against older workers. *E.g.* Labor Report at 21 (discussing "persistent and widespread use of age limits in hiring"). When read as a whole, § 623(a)(2) requires a showing of age-motivated discrimination and can be interpreted to authorize only disparate treatment claims.

In any event, under any of the proposed interpretations of § 623(a)(2), Petitioners do not state a cause of action. Petitioners challenge a pay plan that resulted in higher salary increases for police officers and safety

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[10] That this is the intended meaning of § 623(a)(2) is made clear by contrasting it to the confusion created by Congress' use of the ambiguous term "discriminate" in Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act (NLRA) without also adding the term "because of union membership." *See generally Note, Discrimination and the NLRB: The Scope of Bd. Power Under Sections 8(a)(3) and 8(b)(2)*, 32 U. Chi. L. Rev. 124 (1964) [hereinafter "*Discrimination and the NLRB*"]. Congress' use of more definite terms in the ADEA with the same connotation as "discrimination" and the qualifier "because of age" indicates congressional intent to ensure a requirement of unlawfully motivated discrimination.

dispatchers with five or fewer years of tenure. *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 185 (5th Cir. 2003). Even accepting Petitioners' definition of "because of" to mean causation (rather than subjective motive) and their view that the phrase modifies "affect" rather than "to limit, segregate, or classify," their critical mistake is in failing to recognize that § 623(a)(2) prohibits adverse actions or effects that are "caused" by age, not simply adverse actions that affect older employees. Petitioners' disparate impact claims do not allege that the pay plan was motivated by age; was caused by conscious or subconscious stigmatizing stereotypes; or even that the aging process impaired performance, which caused a difference in pay for older workers under the pay plan. Instead, Petitioners simply argue that the pay plan harmed older workers through lower pay increases. But § 623(a)(2) prohibits limitations or classifications that adversely affect an individual "because of such individual's age," not simply acts that "have an adverse effect on older workers." Pet. Br. 20. The pay plan affected Petitioners "because of" their tenure. This situation varies drastically from *Griggs*, where the Court found that the disparate effect was "directly traceable to race" because African-Americans had been deprived of the skills to demonstrate their true abilities through tests due to poor education in racially segregated schools. In that context, and unlike here, an individual's race (and prior race segregation) could be viewed as "causing" the high failure rate on the test. Accordingly, under any interpretation of § 623(a)(2), Petitioners do not state a claim for age discrimination.

B. Section 623(f)(1) Confirms That The ADEA Does Not Proscribe Disparate Impact.

Petitioners admit that this Court consistently has construed Title VII and the ADEA differently where the text and statutory structure differ—at least "outside the scope of

the two statutes' identical liability provisions." Pet. Br. 15. Their presumption that the liability provisions in the two statutes are identical ignores the effect of the "reasonable factors other than age" (RFOA) clause in § 623(f)(1) of the ADEA. The combination of the prohibitory language in § 623(a) and the exception language in § 623(f)(1) confirms that the ADEA proscribes only disparate treatment. Section 623(f), in relevant part, reads as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization… to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section…where the differentiation is based on reasonable factors other than age….

29 U.S.C. § 623(f). By its plain language, an otherwise prohibited age "differentiation" is lawful if it is based on factors other than age. Accordingly, decisions based on non-age factors that have a disparate impact on older workers are not unlawful under the RFOA clause. *See Mullin*, 164 F.3d at 700-01 (RFOA clause eliminates disparate impact claims); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 734 (3d Cir. 1995) (RFOA clause indicates that neutral employment policies not improperly motivated may be permissible).

Petitioners and their *amici* —faced with the fact that § 623(a)(2), by its own terms, does not authorize a disparate impact claim—argue that authorization for a disparate impact claim is somehow implied by § 623(a) when read in conjunction with the RFOA clause. Apart from demonstrating that the ADEA is not a model of legislative drafting—a fact conceded by all—their arguments are ultimately unpersuasive.

1. The Meaning Of "Otherwise Prohibited" In § 623(f)(1) Derives From The Legal Context Of The ADEA's Enactment.

Petitioners contend that, because the RFOA excuses liability for "otherwise prohibited" conduct when the differentiation is based on factors other than age, the RFOA "necessarily implies that it is possible to violate section [623(a)] through differentiation based on a factor other than age." Pet. Br. 19. This argument is not the best explanation for the interplay between §623(a)(2) and §623(f). The meaning of the "otherwise prohibited" language is clarified by the legal and historical context in which the statute was enacted. That context does not support the claim that the RFOA indicates intent to authorize a disparate impact claim.

At the time the ADEA was enacted in 1967, there was ambiguity surrounding the concept of causation. Title VII and the ADEA both were enacted prior to decisions defining the necessary causal relationship between the improper motive required to trigger liability and the overt act of discrimination. Francis J. Vass, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 456 (1965-66) [hereinafter "Vass, *Title VII: Legislative History*"]. The issue is illustrated by the proposed amendment to the original Title VII seeking to limit liability to instances where the alleged discrimination was *solely* because of race, color, religion, sex, or national origin. *Id.* Congress rejected the amendment, but the fact that the proposal was made at all "points up what [was] a continuing issue under the Labor Management Relations Act (LMRA)." Vass, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. at 456. The issue under the LMRA was whether the improper motive must be the dominant factor, a substantial contributing factor, or merely a factor leading to the overt act. *Id.* The federal courts had required a showing that an unlawful factor was "dominant."

E.g., Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617, 620-21 (5th Cir. 1961) (determination of whether employer committed unlawful discrimination under NLRA depends on whether anti-union animus was the dominant motive). This was not an affirmative defense; the General Counsel was required to satisfy the "dominant" factor test to prove liability in the first instance. The NLRB had required the lesser showing that the unlawful factor was a motive in part. *See Wright Line*, 251 N.L.R.B. 1083 (1980) (tracing history of difference between NLRB and federal courts concerning dual motives). The issues of causation and its proof were clarified after the enactment of the ADEA by a series of decisions including *McDonnell Douglas*' pretext analysis, *Mt. Healthy City of School District Board of Education*, 429 U.S. 274, 287 (1977) (if plaintiff shows unlawful consideration was "a motivating factor," employer has opportunity to show it would have reached the same conclusion even in the absence of the unlawful consideration), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (same).

The notion of causation was further refined by the Civil Rights Act of 1991, which amended Title VII to respond to the "mixed motive" analysis adopted in *Price Waterhouse v. Hopkins*. *See* 42 U.S.C. § 2000e-5(g)(2)(b) and § 2000e-2(m). Under 42 U.S.C. § 2000e-2(m), if the plaintiff proves that an identified protected trait was "a motivating factor," a violation is established "even though other factors also motivated the practice." Once a Title VII plaintiff proves a violation of § 2000e-2(m), she is entitled to certain limited relief under § 2000e-5(g)(2)(b), even if the employer demonstrates that it would have taken the same action in the absence of the impermissible motivating factor. 42 U.S.C. § 2000e-5(g)(2)(b).

Congress did not similarly amend the ADEA. *See Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1305 (11th Cir. 2000) (Section 2000e-5(g)(2)(B) did not amend the ADEA and therefore is inapplicable to ADEA claim). This mixed motive framework would be inappropriate under the ADEA because, unlike Title VII, Congress intended liability under the ADEA to be triggered only when the unfair practice was motivated *solely* by age. *E.g.*, 113 CONG. REC. 31,255 (1967) (remarks of Sen. Javits) (question under ADEA as to whether the Act was violated is: "Was the individual discriminated against *solely* because of age?"); 113 CONG. REC. 1377 (1967) (statements of Secretary of Labor) ("The legislation would clearly indicate that the prohibitions are designed to bar arbitrary age discrimination. Reasonable differentiations not based solely on age…would not fall within the proscription."). Section 623(f)(1) makes this absolutely clear. Therefore, unlike under Title VII, a plaintiff will not prevail under the ADEA merely by showing that age played *a* motivating role. *Cf. Hazen Paper,* 507 U.S. at 609 (disparate treatment claim cannot succeed unless protected trait played a role *and* had a determinative influence on the outcome). Thus, the "otherwise prohibited" language in § 623(f)(1) can be understood to allow employment decisions in which age is "a" motivating factor, so long as the employer would have made the same decision based on non-age factors.

This conclusion is reinforced by the further ambiguity surrounding the concept of "intentional" discrimination. When Title VII and the ADEA were enacted, courts' interpretation of Section 8(a) of the NLRA had replaced the concepts of "intent to discriminate" and "motivation" with a test for "foreseeable consequences." *See Discrimination and the NLRB,* 32 U. Chi. L. Rev. at 127-28 (courts blurred distinction between "motive" and "intent," the latter of which was easily inferred from the probable consequences of

employer action); *Miranda Fuel Co., Inc.*, 140 N.L.R.B. 181, 193, 196 (1962) (Chairman McCulloch, dissenting) (criticizing majority for inferring "motive" to encourage or discourage union membership solely from the "foreseeable result[s]" of the challenged conduct); *see also U.S. v. Tex. Educ. Agency*, 564 F.2d 162, 165-170 (5th Cir. 1977) (rejecting prior rulings that "intent" to discriminate could be shown, without regard to subjective motive, based on the common law principle that an actor is objectively held to intend the reasonably foreseeable results of his actions). Such a test would be particularly inappropriate under the ADEA, where an employer may very well foresee a disparate statistical impact on older workers simply because it relies on a legitimate factor, such as seniority, which is empirically correlated with age. Section 623(f)(1) ensures that age-motivation (rather than some variation of "intent") retains a central role in ADEA cases. With this understanding, the "otherwise prohibited" language makes sense. The ADEA allows an employment decision that has a foreseeable impact on older workers, so long as the employer's decision would have been the same irrespective of age.

2. The RFOA Clause Is Not An Affirmative Defense.

In a related argument, *amicus curiae* contends that the "otherwise prohibited" language in § 623(f)(1) means that the RFOA does not come into play until a violation of the ADEA has been established and that, therefore, the RFOA is an "affirmative defense." Br. of Nat'l Employment Lawyers Ass'n (NELA) at 19. This argument is incorrect.

The RFOA clause is not an affirmative defense. It is a definitional provision underscoring what "shall not be unlawful" discrimination under § 623(a). *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1988). The ADEA's legislative history confirms this interpretation.

E.g., 113 CONG. REC. 1377 (1967) (statements of Secretary of Labor) ("The legislation would clearly indicate that the prohibitions are designed to bar arbitrary age discrimination. Reasonable differentiations not based solely on age…would not fall within the proscription.").

The fact that the bona fide occupational qualification (BFOQ) clause—the clause preceding the RFOA in § 623(f)(1)—has been interpreted to be an affirmative defense, *see* NELA Br. 20-21, does not alter this conclusion. There is no clear indication that the enacting Congress intended either clause to be an affirmative defense. The prefatory language of § 623(f)—indicating that the subsequent clauses define what is *not* unlawful activity—suggests otherwise. In any event, the RFOA differs from the BFOQ. The latter addresses practices that are based solely and expressly on age—not practices based entirely or additionally on factors *other* than age. This significant difference supports the view that the RFOA is a definitional provision, notwithstanding the BFOQ interpretation of the affirmative defense.

NELA's additional arguments based on the Older Workers Benefit Protection Act of 1990 (OWBPA) also fail. NELA Br. 15-24. The OWBPA amended the ADEA by expressly placing the burden of proof on the employer to prove the bona fide seniority system and the bona fide employee benefit plan exceptions in § 623(f)(2). *See* Pub. L. No. 101-433, § 103, 101 Stat. 978. The OWBPA's amendments were specifically designed to overturn the Court's interpretation of the ADEA in *Public Employees Retirement Systems v. Betts*, 492 U.S. 158 (1989). There, the Court held that an employee challenging the validity of a facially age-based employee benefits plan under the ADEA bears the burden of proving that the employer had adopted the plan as a subterfuge for intentional age discrimination. *Id.* at 181. Although the OWBPA altered *Betts*' outcome, the

revision cannot be viewed as correcting the Court's reading of the ADEA, as NELA suggests. *See* NELA Br. 15-18. The better view is simply that the 1990 Congress in the OWBPA altered the burden that previously existed under the ADEA with respect to proving the bona fides of a seniority system or employee benefit plan.

However the OWBPA may have modified the burden of proof for the BFOQ under § 623(f)(2), it made no changes to the RFOA clause. In fact, although both the Senate and House bills proposed to revise § 623(f)(1) to expressly allocate the burden of proof to the employer,[11] this provision was deleted from the final bill that ultimately became the OWBPA.[12] Thus, NELA's notion that the RFOA clause should be treated as an affirmative defense is unfounded. The OWBPA suggests no such thing.

3. The Word "Reasonable" In The RFOA Clause Does Not Imply The Concept Of "Business Necessity."

Whether or not the RFOA clause is viewed as an affirmative defense, it is clear that "motive" is the key inquiry under the ADEA. Thus, the RFOA clause's use of the term "reasonable" cannot be read to require a showing of "business necessity," which forces an employer to justify its practice as essential (whatever its motive may have been). Indeed, since the disparate impact theory had not yet been

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[11] *See* H.R. REP. 101-664, at 3, 46-47 (1990) (BFOQ exception in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof); S. REP. No. 101-263, at 2, 29-30 (1990) (employer bears burden to plead and prove defenses in section 4(f)).

[12] *See* 136 CONG. REC. 13,596-97 (1990) ("not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law").

formulated at the time the ADEA was enacted, Congress was contemplating no such thing. The term "reasonable" merely reflects the ADEA's recognition that stereotypical assumptions about older workers' ability to do the job may have a basis in fact in individual cases. In this context, the term "reasonable factors" is in contradistinction to the words "assumed" or "arbitrary."[13] "Reasonable" means rational and in accordance with reason or sound thinking. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1457 (4th ed. 2000).[14] Contrary to Petitioners' argument, the RFOA is not "mere surplusage" under this analysis: The RFOA's function is to differentiate between unlawful age stereotyping and lawful employment decisions where, even if age could be said to be "a" factor, the decision was reasonably based on factors other than age. For decisions in

[13] 113 CONG. REC. 31,254 (1967) (remarks of Sen. Yarborough) ("a great deal of the problem stems from pure ignorance: there is simply a widespread irrational belief" about the capabilities of older workers); *Senate Hearings* at 39 (statement of Secretary of Labor) ("[This bill] does not prohibit or apply in any way to differentiations or distinctions being made on the basis of age so far as there is a legitimate relevance between age and employment capacity. The 'discrimination' it is directed against is the 'unjust' or 'arbitrary' distinction (which is what 'discrimination' is normally taken to mean) which may be made in the absence of any legitimate relevance between age and employment capacity."); *see also Discrimination and the NLRB*, 32 U. Chi. L. Rev. at 127 (discussing dispute about meaning of "discrimination" in Section 8(a)(3) of the NLRA and identifying various possible interpretations, including "differentiation or distinction without sufficient reason, a meaning commonly conveyed by use of the adjectives 'arbitrary' or 'invidious'").

[14] *See Miranda Fuel Co., Inc.*, 140 N.L.R.B. 181, 185-86 (1962) (using "arbitrary" synonymously with the terms "irrelevant reasons" and "invidious" and indicating that, when different treatment is "based on race alone," it is "obviously irrelevant and invidious").

which age is not at all a factor—as in disparate impact cases—the determination that the ADEA was not violated requires no reference to § 623(f)(1).

For example, an employer could discharge an older worker for poor attendance due to chronic health problems, which problems were caused by age. If the company decision maker were asked at the time of the discharge what was in her mind, she might say, "I am firing the employee because his age has affected his health, and I can't rely on him anymore." Even though, in this example, the employer may believe that the employee's poor health is attributable to his advancing age, the employer can lawfully discharge the employee based on the attendance policy, even if that policy has a disparate impact on a group of older workers. If, however, the employer had simply assumed that the older employee was unreliable because of likely health problems related to age, and did not bother to test the assumption in that individual case, the discharge would be *solely* because of age and, therefore, unlawful.[15]

Even if, as in the example, the employer contemplates the employee's age or relies on a factor known to be correlated with age, the problem of inaccurate age stereotypes disappears if the employer's consideration of the individual's attendance is the dominant basis of the adverse decision. The employer's reliance on a factor that correlates with age would be unlawful only if the employer was not only aware of the correlation, but acted because of it. Since age stereotyping cannot be inferred simply from an empirical

[15] *See* Labor Report at 11 (it would not be reasonable to exclude all older workers from consideration for certain jobs because *as a group* they are more subject to health problems associated with growing older; the Report recognizes, however, that when older workers are considered on their merits, a proportion of them will fail to qualify).

correlation with a non-age factor, the disparate impact theory does not fit in the ADEA context. Rather, the flexible burden-shifting framework to examine motive established in *McDonnell Douglas* is well-suited for resolving the proper ADEA inquiry. The overly broad and burdensome "business necessity" affirmative defense would not serve that purpose.

C. Legislative History Shows Congress' Intent To Tailor The ADEA To Address The Specific Qualities Of Age Discrimination.

The ADEA's legislative history confirms that its language was intended to create a cause of action only for disparate treatment. The Labor Report identified factors that adversely affect older workers in employment, but, because of the unique qualities of ageism (discussed above), it recommended legislation to address only one: "arbitrary age discrimination." Labor Report at 21. Having no intent to recommend legislation against all factors that disparately affect older workers, the Secretary gave "arbitrary discrimination" a specific meaning: "rejection [of older workers] because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for this assumption*." Labor Report at 2 (emphasis in original); *see* Labor Report at 5 ("[T]he findings relate to the entire range of factors which tend to have adverse effects on the employment of older workers. Some of these factors involve what is properly identified as arbitrary discrimination. Others do not."). Employment policies erecting age limits were the primary and repeated examples of such discrimination. *E.g.*, Labor Report at 6. When Congress enacted the ADEA, it expressly stated its focus on such "arbitrary" age discrimination. 29 U.S.C. § 621.

Petitioners' broad interpretation of the Labor Report to suggest otherwise relies on a misquotation and is simply wrong. The Labor Report did not say that "it would be

'futile as public policy' to focus solely on the elimination of explicit age limits." Pet. Br. 26 (citing Labor Report at 21). The passage, in fact, reads as follows:

> [T]he most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as 'arbitrary'...."

Labor Report at 21. In other words, it would be futile to outlaw the entire spectrum of age restrictions. Based on the Labor Report's findings, Congress decided that other factors adversely affecting older workers' employment were more suitably addressed, not by legislation, but by education and training programs. *See* 29 U.S.C. § 622 (directing Secretary of Labor to develop an education and research program); *Senate Hearings* at 38-39 (statement of Secretary of Labor) (deliberate acts will be prohibited by the legislation; other acts will be remedied by research, education, and training – to do more would be premature); Labor Report at 22 (in instances of alleged arbitrary discrimination where the facts indicate that older worker needs reeducation, training, counseling, or health and other services, the individual should be referred to appropriate programs for assistance).

The ADEA's express focus on "arbitrary" discrimination demonstrates that it was intended to be narrower in scope than Title VII.[16] In contrast to the

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[16] Krop, *Age Discrimination*, 34 Stan. L. Rev. at 854 (Title VII's purpose is broader than the ADEA's, making disparate impact proper only for Title VII); Evan H. Pontz, Comment, *What a Difference the ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 299-300 (1995) (analyzing meaning of "arbitrary discrimination").

historical facts that Congress confronted when it addressed racial discrimination in Title VII, historical prejudices and lingering effects of prior discrimination do not justify a disparate impact claim under the ADEA. *Hiatt v. Union Pac. R.R. Co.*, 859 F. Supp. 1416, 1436 (D. Wyo. 1994) (unlike in *Griggs*, correlation between age and ability cannot be traced to a history of past discrimination). All older workers were once younger and able to make choices about their education, training, and employment free from age discrimination. Any current correlation between age and ability cannot be viewed as "directly traceable to" or "because of" lifelong age discrimination. *See Mullin*, 164 F.3d at 701 (age discrimination correlates with current job conditions, not past discriminatory practices); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 301, 313 (1976) (unlike race, the aged "have not experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"). Therefore, an employer's facially neutral practice that has a disparate impact on older workers cannot raise an inference that past discrimination is being perpetuated—there is no past discrimination to perpetuate. Older employees, in fact, may have benefited from past age discrimination during their careers. *Hiatt,* 859 F. Supp. at 1436 (individuals were previously younger and possibly beneficiaries of any age discrimination). Thus, *Griggs*' concern with avoiding the perpetuation of past discrimination simply does not apply in the ADEA context.

Further, although the particular evil of invidious discrimination and its distorting affects on decision making may be an additional reason for applying the disparate impact theory, this rationale is out of place in age discrimination cases. As the Labor Report established, invidious age prejudices are uncommon. In this context, the burden of proving "business necessity" is disproportionate to the harm

sought to be remedied. Under the circumstances alleged here, for example, disparate impact theory would require the City of Jackson to prove that there is a "compelling need" for its proposed more competitive salary structure and that there is "no alternative" to implementing that proposal. *See, e.g., Kirby v. Colonial Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980) (must show not merely routine business considerations, but a "compelling need," for which there is "no alternative"). The disparate impact theory, with no consideration of motive and a defense only of business necessity, is simply too broad and intrusive to serve as a well-tailored means of identifying and correcting age stereotypes. *See DiBiase,* 48 F.3d at 734 n.21 (disparate impact with its defense of business necessity could "subject employers to unreasonable intrusions by juries into their business practices," such as work schedules and medical insurance); Nathan E. Holmes, Comment, *The Age Discrimination in Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. Cin. L. Rev. 299, 323 (2000) (business necessity too intrusive a means to identify discriminatory motives and over-predicts age discrimination).

In sum, Petitioners' and *amici*'s analysis of the ADEA to require an inference of a disparate impact claim in § 623(a) does not withstand scrutiny. The only reasonable interpretation of the interplay between §§ 623(a) and 623(f)(1) is that Congress proscribed only age-motivated conduct in the former. The latter clarified that conduct for which age is "a" motivating factor is not unlawful if the same decision would have been made irrespective of age. Because motive plays an indispensable role under the ADEA, the disparate impact theory is not available.

D. The EEOC's Interpretive Guidelines Cannot Create A Disparate Impact Claim.

Although 29 C.F.R. § 1625.7(d) seeks to transplant disparate impact into the ADEA context and to interpret the RFOA clause to mean "business necessity," it is only an EEOC policy guideline. *See* 46 Fed. Reg. 47,724 (1981) (ADEA guidelines are only statements of EEOC policy and do not comply with legal requirements for rulemaking). The force of such guidelines is a function of their persuasive value. *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001) (no *Chevron*-deference to guidelines). The EEOC provided no substantive analysis for adopting the disparate impact guideline. Because it simply assumed, on the basis of *Griggs*, that the disparate impact theory is available, the guideline is unpersuasive. *Smith*, 351 F.3d at 189 n.5.

More importantly, "[e]ven for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation "is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Cline*, 124 S. Ct. at 1248. For the reasons discussed at length above, the ADEA, properly read in the context in which it was enacted, proscribes only disparate treatment. Neither the statute's language nor its history permit an inference of a disparate impact claim. The EEOC's decision to discard age-motivation in 29 C.F.R. § 1625.7(d) is inconsistent with the ADEA's language, both as originally enacted and as amended. It warrants no deference. *Betts*, 492 U.S. at 171 ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AZEL P. SMITH, ET AL.,
Petitioners
v.
CITY OF JACKSON, MISSISSIPPI, ET AL.,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE CORNELL UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. DISPARATE TREATMENT AND DISPARATE IMPACT ARE NOT DISTINCT CLAIMS, BUT LEGAL THEORIES OR METHODS OF PROVING THE CLAIM OF DISCRIMINATION. THAT CONGRESS WAS UNAWARE OF DISPARATE IMPACT WHEN THE AGE ACT WAS PASSED IS, THEREFORE, UNIMPORTANT. DISPARATE IMPACT PROVES DISCRIMINATION, AND THIS COURT SHOULD RECOGNIZE IT 4

A. Justice Powell's theorem holds that Disparate Treatment and Disparate Impact are legal theories of proving the claim of discrimination. This Court has subscribed to Justice Powell's theorem 4

B. A single claim of discrimination exists. Disparate Treatment and Disparate Impact are methods of proving this claim. They are similar except for how they prove causation 7

1. *The term "prima facie case" has two meanings: the elements of a claim and the evidence that proves the elements of a claim* 7

TABLE OF CONTENTS
(continued)

2. *The claim of discrimination has five elements* . . 8

3. *Disparate Treatment and Disparate Impact are prima facie cases in the second sense. They prove the elements of the claim of discrimination. They differ chiefly in the ways they prove the element of causation* 9

THE FIRST ELEMENT: The employer was covered by the act. 11

THE SECOND ELEMENT: The employer offered an employment opportunity 11

THE THIRD ELEMENT: The plaintiff was protected by the act, that is, the plaintiff was qualified for, and willing to accept, the opportunity 12

THE FOURTH ELEMENT: The employer denied or afforded the plaintiff a lesser chance to benefit from the opportunity 13

THE FIFTH ELEMENT: A protected characteristic of the plaintiff was a cause of the employer's act 14

4. *The defenses to Disparate Treatment and Disparate Impact both attack the same element of the claim of discrimination, namely, the plaintiff's qualifications, and therefore confirm that Disparate Treatment and Disparate Impact are not separate claims* 16

C. Disparate Treatment and Disparate Impact constitute a scheme for classifying the methods of proving discrimination. The existence of an alternative classification scheme confirms Justice Powell's theorem 18

D. Although no longer true of Title VII because of the 1991 amendments, Justice Powell's theorem remains true of the Age Act 20

E. Courts traditionally recognize methods of proving claims that have been created by legislatures, and therefore it does not matter that Congress was unaware of Disparate Impact when the Age Act was passed. What does matter is that Disparate Impact proves discrimination 21

F. Disparate Impact should be recognized as a method of proving discrimination under the Age Act 22

II. EMPLOYMENT PRACTICES WITH A DISPARATE IMPACT ARE THE SORT OF EVIL THAT CONGRESS MEANT TO ERADICATE 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Connecticut v. Teal,
457 U.S. 440 (1982) 2, 5

Dothard v. Rawlinson,
433 U.S. 321 (1977)
re. Disparate Impact 10, 11, 12, 13, 14, 15, 17
re. BFOQ 16

Griggs v. Duke Power Company,
401 U.S. 424 (1971) 3, 6, 21

Holy Trinity Church v. United States,
143 U.S. 457 (1892) 22

International Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977) 10, 11, 12, 13, 14, 20

International Union, United Automobile Workers v. Johnson Controls,
499 U.S. 187 (1991) 16

Trans World Airlines v. Thurston,
469 U.S. 111 (1985) 10, 11, 12, 13, 14, 19

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426 U.S. 229 (1976) 6

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487 U.S. 977 (1988) 2, 3, 6, 15

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(continued)

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Pub. L. 90-202, 81 Stat. 602,
29 U.S.C. §§621 et seq. 3, 4, 20, 21,22,

§2(b), 29 U.S.C. § 621(b) 23, 24

§ 4(f)(1), 29 U.S.C. § 623(f)(1) 16

Title VII of the Civil Rights Act of 1964,
Pub. L, 88-352, 78 Stat. 253,
42 U.S.C. §§ 2000e et seq. 3, 4, 5, 20, 21

§ 703, 42 U.S.C. § 2000e-2 6

§ 703(e), 42 U.S.C. § 2000e-2(e) 16

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Pub. Law 102-166, 105 Stat. 1071 ..... 3, 4

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INTEREST OF THE AMICI CURIAE[1]

The Cornell University chapter of the American Association of University Professors seeks to advance academic freedom, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. The chapter is particularly concerned with issues of age discrimination; most members of the chapter are over age 40. Membership is open to all faculty, librarians, and academic professionals employed by Cornell University. Librarians and academic professionals do not enjoy tenure, and increasing numbers of teaching and research positions are being taken off the tenure track. All persons in these positions can be discharged at will and are subject to the discriminatory effects of non-job-related criteria. Even tenured professors are not fully protected from Disparate Impact discrimination.

The National Lawyers Guild was founded in 1937 as the first integrated national organization of lawyers in the United States. Based on the premise that the law should be used for social amelioration, the Guild currently consists of approximately 6,000 lawyers, legal workers and law students. Individually and on specific shared projects, members work nationally on a wide range of legal concerns. Labor and employment issues have been a central focus of the Guild's mission during its nearly seventy-year history, and its Labor and Employment Committee monitors working conditions in this country and internationally.

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1. The parties' written consent to the filing of briefs amicus curiae has been filed with the Clerk of this Court. Amici state that this brief was not authored in whole or in part by counsel for any party and that no party or entity, other than Amici and their counsel, has made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

I.A (pp. 4-7) . Disparate Treatment and Disparate Impact are not distinct claims, but instead are legal theories or methods of proving the single claim of discrimination. Justice Powell recognized the true nature of these theories in *Connecticut v. Teal* at 458-459 (1982) (Powell, J., dissenting),[2] and seven members of this Court joined Justice O'Connor in subscribing to Justice Powell's theorem in *Watson v. Fort Worth Bank & Trust* at 985-987 (1988).

I.B (pp. 7-18). The claim of discrimination comprises five elements or material facts. Disparate Treatment and Disparate Impact are methods of proving these material facts. As methods of proof, Disparate Treatment and Disparate Impact differ chiefly in their evidence of causation. Both methods prove the material fact that a protected characteristic was a cause of the employer's denial of an employment opportunity to the plaintiff; Disparate Treatment proves causation with evidence of intent (the employer intentionally disadvantaged the plaintiff because of a protected characteristic), whereas Disparate Impact proves causation with evidence of effect (an employment practice was "functionally equivalent to intentional discrimination," *Watson* at 987, because the practice had an adverse effect on the plaintiffs' class and was not job related). The defenses in Disparate Treatment and Disparate Impact – respectively, the bona fide occupational qualification and job relatedness – attack the same material fact, namely, the plaintiff's qualifications. Thus, Disparate Treatment and Disparate Impact are methods of proving or

2. Complete citations to the cases, statutes, and other authorities cited in this brief appear in the Table of Authorities.

disproving the material facts of the single claim of discrimination.

I.C (pp. 18-20). Disparate Treatment and Disparate Impact are one scheme for classifying the methods of proving discrimination. An alternative scheme is equally descriptive of these methods; the alternative focuses on whether the evidence is conventional or statistical instead of whether causation is proved with evidence of intent or effect. That the methods of proving the claim of discrimination may be classified in different ways emphasizes that Disparate Treatment and Disparate Impact are not themselves claims, but instead are methods of proving the claim of discrimination.

I.D (pp. 20-21). Justice Powell's theorem is no longer true of Title VII of the Civil Rights Act of 1964 because the Civil Rights Act of 1991 amended Title VII to provide for different relief for Disparate Treatment (intentional discrimination) and Disparate Impact. The 1991 act, however, did not amend the Age Discrimination in Employment Act in any pertinent way, and Justice Powell's theorem remains true of the Age Act.

I.E (pp. 21). Congress was unaware of Disparate Impact in 1967, but this fact is not important because recognizing methods of proving a claim is the province of the judiciary. The question, therefore, is whether Disparate Impact proves discrimination, and the answer to this question has been yes since *Griggs v. Duke Power Company* (1971).

I.F (p. 22). The Age Act outlaws age discrimination in employment. This Court has held that both Disparate Treatment and Disparate Impact prove discrimination. It follows that this Court should approve Disparate Impact as a method of proving age discrimination in employment.

II (pp. 22-23). The purpose of the Age Act is to promote employment of workers on the basis of ability instead of age. Employment practices with a Disparate Impact do just the opposite: they select on the basis of age, not ability. Thus, practices with a Disparate Impact fall squarely within the evil which the Age Act was intended to eradicate.

ARGUMENT

I

DISPARATE TREATMENT AND DISPARATE IMPACT ARE NOT DISTINCT CLAIMS, BUT LEGAL THEORIES OR METHODS OF PROVING THE CLAIM OF DISCRIMINATION. THAT CONGRESS WAS UNAWARE OF DISPARATE IMPACT WHEN THE AGE ACT WAS PASSED IN 1967 IS, THEREFORE, UNIMPORTANT. DISPARATE IMPACT PROVES DISCRIMINATION, AND THIS COURT SHOULD APPROVE IT.

A

Justice Powell's theorem holds that Disparate Treatment and Disparate Impact are legal theories or methods of proving the claim of discrimination. This Court has subscribed to Justice Powell's theorem .

Disparate Treatment and Disparate Impact are normally thought to be distinct claims; however, under the Age Discrimination in Employment Act of 1967 (Age Act) – as well as under Title VII of the Civil Rights Act of 1964 prior to amendment by the Civil Rights Act of 1991 – *Disparate Treatment and Disparate Impact are not claims, but legal theories or methods of proving the claim of discrimination.* Justice Powell recognized the true nature of these theories twenty years ago. He stated the following theorem:

> [W]hile disparate-treatment cases focus on the way in which an individual has been treated, disparate-impact cases are concerned with the protected group.... The Court, disregarding the distinction drawn by our cases, repeatedly asserts that Title VII was designed to protect individual, not group, rights.... But this argument confuses the *aim* of Title VII with the **legal theories** through which its aims were intended to be vindicated. It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct **methods of proof**. In one set of cases – those involving direct proof of discriminatory intent – the plaintiff seeks to establish direct, intentional discrimination against him.... In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference* – by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process' "built-in headwinds."

Connecticut v. Teal at 458-459 (Powell, J., dissenting; citation omitted; italics in original; boldface added).

Justice Powell's theorem appeared in a dissent joined by Chief Justice Burger and Justices Rehnquist and O'Connor; the majority of the Court did not comment on the theorem. A few years later, however, this Court subscribed to the theorem. In a section of her opinion joined by Chief Justice Rehnquist and Justices Brennan, White, Marshall, Blackmun, Stevens, and Scalia (Justice Kennedy not participating), Justice O'Connor

repeated the theorem that Disparate Treatment and Disparate Impact are not distinct claims, but rather legal theories or methods of proving the claim of discrimination. Justice O'Connor wrote:

> Several of our decisions have dealt with the **evidentiary standards** that apply when an individual alleges that an employer has treated that particular person less favorably than others because of the plaintiff's race, color, religion, sex, or national origin. In such "disparate treatment" cases ... the plaintiff is required to prove that the defendant had a discriminatory intent or motive. In *Griggs v. Duke Power Co.*, this Court held that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated § 703 [of Title VII].... The factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination. The evidence in these "disparate impact" cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities. **The distinguishing features of the factual issues that typically dominate disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used.**

Watson v. Fort Worth Bank & Trust at 985-987 (1988) (citations omitted; boldface added). *See also Washington v. Davis* at 253-254 (1976) (Stevens, J., concurring), in which Justice Stevens may have anticipated the theorem ("the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume").

B

A single claim of discrimination exists. Disparate Treatment and Disparate Impact are methods of proving this claim. They are similar except for how they prove causation.

Under Justice Powell's theorem, one claim of discrimination exists. It follows that a single set of facts constitutes the elements or "prima facie case in the first sense" of discrimination. Disparate Treatment and Disparate Impact are "prima facie cases in the second sense," that is, legal theories or methods of proving the claim of discrimination. They are similar except in the ways they prove the element of causation.

1

The term "prima facie case" has two meanings: the elements of a claim and the evidence that proves the elements of a claim.

The term "prima facie case" is used in two senses. It can mean the *elements* or the *material facts* of a claim; for example, the elements of battery are (1) the defendant (2) intentionally (3) inflicted a physical contact (4) on the plaintiff, and the contact was (5) harmful or offensive. Prosser, *Handbook of the Law of Torts* § 9. This may be called the prima facie case in the first sense. "Prima facie case" can also mean the *evidentiary facts that prove* the elements of a claim; for example, a prima facie case of battery may be proved by the plaintiff's testimony that he was punched in the nose by the defendant, who had just said, "I am going to punch you." This may be called the prima facie case in the second sense. Similar prima facie cases in the second sense may be grouped together and called a legal theory or method of proof.

Only one prima facie case in the first sense, or set of material facts, exists for each claim; these facts *constitute* the claim. In contrast, numerous prima facie cases in the second sense may exist for a claim. A claim may be *proved* by various theories or methods of proof.

2

The claim of discrimination has five elements.

The prima facie case in the first sense of discrimination – the elements of the claim – consists of these material facts:

1) The employer (or union or employment agency) was covered by the act.

2) The employer offered an employment opportunity.

3) The plaintiff was protected by the act, that is, the plaintiff was qualified for, and willing to accept, the opportunity.

4) The employer denied or afforded the plaintiff a lesser chance to benefit from the opportunity.

5) A protected characteristic of the plaintiff (race, sex, etc. or age) was a cause of the employer's act.

See Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967* (2004) at 10-26.

3

Disparate Treatment and Disparate Impact are prima facie cases in the second sense. They prove the elements of the claim of discrimination. They differ chiefly in the ways they prove the element of causation.

Justice Powell's theorem holds that Disparate Treatment and Disparate Impact are legal theories or methods of proof; thus, they are prima facie cases in the second sense. Being methods of proof, they establish the material facts or elements of the claim of discrimination. Therefore, the difference between Disparate Treatment and Disparate Impact lies in the way in which they prove the elements of the claim. They differ chiefly in how they prove causation.

Disparate Treatment comes in two varieties. In one, the evidence is entirely conventional; let us call this variety "Conventional Disparate Treatment." In the other variety, the evidence is conventional and statistical; let us call this variety "Statistical Disparate Treatment." Disparate Impact also comes in varieties; the one that dominates the cases, and is the focus of the following discussion, uses conventional and statistical evidence.

This Court has held that the two varieties of Disparate Treatment as well as Disparate Impact prove the elements of the claim of discrimination.

CONVENTIONAL DISPARATE TREATMENT: *Trans World Airlines v. Thurston* (1985) illustrates the way that exclusively conventional evidence can prove discrimination. An airline allowed flight captains under the age of 60 to transfer to the job of flight engineer, but did not allow captains over age 60 to transfer.[3] *Thurston* at 114-116.

STATISTICAL DISPARATE TREATMENT: *International Brotherhood of Teamsters v. United States* (1977) illustrates one way that conventional and statistical evidence can combine to prove discrimination. A trucking firm employed almost no persons of color in the job of line driver in cities in which people of color constituted large fractions of the population.[4] *Int'l B'd Teamsters* at 337 and n. 17.

DISPARATE IMPACT: *Dothard v. Rawlinson* (1977) illustrates another way that conventional and statistical evidence can combine to prove the elements of discrimination. The State of Alabama required prison guards to stand a minimum of 5 feet 2 inches tall and weigh a minimum of 120 pounds. These minima were satisfied by 99 percent of men but only 51 percent of women, and the state failed to prove the minima were connected to successful performance of the job. *Dothard* at 323-324, 329-332.

Let us now examine in detail how these three methods of proof establish the elements of the claim of discrimination.

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3. This statement of the facts of *Thurston* is slightly simplified.

4. Only one aspect of the *Teamsters* case is discussed herein.

THE FIRST ELEMENT:
The employer was covered by the act.

CONVENTIONAL DISPARATE TREATMENT: Coverage is proved with conventional evidence of the size of the employer's work force in the current or preceding year. Coverage was not contested in *Thurston*.

STATISTICAL DISPARATE TREATMENT: Same as above. Coverage was not contested in *Teamsters*.

DISPARATE IMPACT: Same as above. Coverage was not contested in *Dothard*.

THE SECOND ELEMENT:
The employer offered an employment opportunity.

CONVENTIONAL DISPARATE TREATMENT: The existence of an employment opportunity is proved with conventional evidence, for example, that the employer was hiring workers. In *Thurston* the airline allowed some captains to transfer to the job of flight engineer.

STATISTICAL DISPARATE TREATMENT: Same as above. In *Teamsters* the firm was hiring line drivers.

DISPARATE IMPACT: Same as above. In *Dothard* the state was hiring prison guards.

THE THIRD ELEMENT:

The plaintiff was protected by the act, that is, the plaintiff was qualified for, and willing to accept, the opportunity.

CONVENTIONAL DISPARATE TREATMENT: Protection by the act is proved with conventional evidence of the plaintiff's interest in and qualifications for the opportunity. In *Thurston* captains were qualified to train for the duties of flight engineer and desired to transfer because of a federal regulation that prohibited them from continuing to serve as captains.

STATISTICAL DISPARATE TREATMENT: The plaintiffs' interest and qualifications are proved in Statistical Disparate Treatment with statistics concerning the "qualified labor pool." This is the group of workers who are willing and able to benefit from the opportunity in question (usually, a job). In most cases, evidence of the qualified labor pool is practically impossible to obtain, and so a proxy is used to represent it. If a proxy is fair, what is true of the proxy is true of the qualified labor pool, and it follows that facts proved about the persons in a fair proxy are true of the workers who are qualified for and interested in the opportunity. In *Teamsters* the proxy was the population surrounding the trucking terminals; the population was a fair proxy because there was no evidence that proportionally more whites than people of color were interested in or qualified for the job of line driver.

DISPARATE IMPACT: Same as Statistical Disparate Treatment. In *Dothard* the proxy was the population of the nation; the population was a fair proxy because there was no evidence that the height and weight characteristics of the national population differed from the characteristics of the qualified labor pool for the job of prison guard.

THE FOURTH ELEMENT:

The employer denied or afforded the plaintiff a lesser chance to benefit from the opportunity.

CONVENTIONAL DISPARATE TREATMENT: Denial of opportunity is proved with conventional evidence of how the employer treated the plaintiff. In *Thurston* the airline refused to allow captains over age 60 to transfer to flight engineer.

STATISTICAL DISPARATE TREATMENT: Denial of opportunity is proved in Statistical Disparate Treatment with statistical evidence that the employer disparately awarded opportunities to the plaintiffs and their comparators in the qualified labor pool. A disparity may be established by comparing the plaintiffs' share of the proxy directly with their share of the opportunity, or by comparing the success rates of the plaintiffs and their comparators in obtaining the opportunity. The former comparison was used in *Teamsters*. People of color were 10 to 50 percent of the populations surrounding the trucking firm's terminals and, therefore, were 10 to 50 percent of the qualified labor pool for the job of line driver; but people of color held almost none of the line driving jobs.

DISPARATE IMPACT: Same as Statistical Disparate Treatment with a linguistic exception: in Disparate Impact a disparity is called an "adverse effect."[5] The height and weight minima in *Dothard* had an adverse effect because they were satisfied by 99 percent of men but only 51 percent of women.

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5. The term "adverse effect" refers to a disparity created by an employment practice. The term "Disparate Impact" refers to an employment practice that has an adverse effect and is not job related.

THE FIFTH ELEMENT:
A protected characteristic of the plaintiff was a cause of the employer's act.

CONVENTIONAL DISPARATE TREATMENT: Causation is proved with conventional evidence of intent: the employer disadvantaged the plaintiff on account of a protected characteristic. In *Thurston* the airline intentionally disadvantaged the plaintiffs by allowing captains under age 60, but not those over age 60, to transfer to flight engineer.

STATISTICAL DISPARATE TREATMENT: Same as Conventional Disparate Treatment. In *Teamsters* the employer purposefully gave false information to applicants of color and ignored their applications. *Int'l B'd Teamsters* at 338.

DISPARATE IMPACT: Causation is proved in Disparate Impact by effects. The proof rests on two findings: (1) the adverse effect resulted from a specific employment practice (2) which was not job related or a business necessity. In *Dothard* the adverse effect resulted from the height and weight minima, which did not correlate with successful performance of the job.

The theory of causation in the Disparate Impact method of proof requires a word of explanation. As just noted, two facts establish causation: an employment practice has an adverse effect on the plaintiffs' class, and the practice is not job related or a business necessity. A practice that is not job related serves no legitimate interest of the business. Such a practice is legally harmless as long as it affects protected classes equally; an employer who refuses to hire Virgos does not discriminate against blacks or whites, men or women, older or younger workers. But a practice that is not job related *and* systematically favors one class over another is "in operation ... functionally

equivalent to intentional discrimination." *Watson* at 987. The reason can be understood by asking the question, what does such a practice do? The answer is that **a practice with a Disparate Impact does one thing and one thing only: it favors members of one class over another.** Thus, in *Dothard* the height and weight minima had an adverse effect on women. The minima served no legitimate interest of the employer because there was no evidence that larger persons made better prison guards than did smaller persons. But the minima were not inert. They did one thing: they favored men over women.

It is now evident that the Disparate Treatment and Disparate Impact methods of proof overlap substantially. The major difference between them is the way causation is established. Disparate Treatment establishes causation with proof of intent – the employer intentionally disadvantaged the plaintiffs; Disparate Impact establishes causation with proof of effect – an employment practice had an adverse effect on the plaintiffs and was not job related and, therefore, was "in operation ... functionally equivalent to intentional discrimination," *Watson* at 987. Under both theories, the evidence proves the same material fact, namely, that a protected characteristic of the plaintiffs was a cause of their losing an employment opportunity.

This analysis demonstrates that Disparate Impact and Disparate Treatment are not separate claims. Instead, they are prima facie cases in the second sense – legal theories or methods of proving the single claim of discrimination. Examination of the defenses under these methods of proof leads to the same conclusion.

4

The defenses to Disparate Treatment and Disparate Impact both attack the same element of the claim of discrimination, namely, the plaintiff's qualifications, and therefore confirm that Disparate Treatment and Disparate Impact are not separate claims.

The evidence in the Disparate Treatment and Disparate Impact methods of proof is directed at single set of material facts. The same is true of the substantive defenses. Each of these defenses attacks the same material fact, namely, the plaintiff's qualifications for the opportunity.

The defense in the Disparate Treatment method of proof is the bona fide occupational qualification (BFOQ). An employer may award employment opportunities on the basis of age, religion, sex, or national origin if the characteristic is "reasonably necessary to the normal operation of that particular business." Age Act, § 4(f)(1); Title VII, § 703(e). A characteristic is a BFOQ if all or substantially all members of the class who lack the characteristic are unable to perform an essential task of the job and individual testing is not feasible. *See* Lindemann & Grossman, *Employment Discrimination Law* at 395 and ff. So far we have discussed the Disparate Impact issue in *Dothard,* but now we turn to the BFOQ issue in the case; and on the latter issue this Court held that being male was a BFOQ for the job of guard in the maximum-security prisons of Alabama because of the risk that a woman would be sexually assaulted. *Dothard* at 332 and ff.

Procedurally, a BFOQ is an affirmative defense because the burden of persuasion rests on the defendant. *Dothard.* at 334; *International Union, United Automobile Workers v. Johnson Controls* at 206 (1991). Substantively, a BFOQ destroys an

element of the plaintiff's prima facie case. Being qualified for the opportunity is an element of the claim of discrimination. If all persons of the plaintiff's age, religion, sex, or national origin are unable to perform an essential task of the job, the plaintiff is simply not qualified for the job. No woman was qualified to be a guard in the maximum-security prisons of Alabama because every woman faced the risk of sexual assault.

The defense in the Disparate Impact method of proof is that the employer's practice is job related or a business necessity. After the plaintiff proves that an employment practice had an adverse effect, the employer may defend (in an employee selection case such as the one at bar) by proving that the practice distinguished between qualified and unqualified workers. *See* Lindemann & Grossman, *Employment Discrimination Law* at 106 and ff. For example, suppose the height and weight minima in *Dothard* had been job related, that is, that larger persons had in fact made better prison guards than smaller persons did. In this event, the minima would have distinguished between qualified and unqualified workers. Proportionally fewer women than men would have been qualified for the job, but an employer is entitled to select qualified workers.

Thus, when an employer proves that its selection criterion is job related, the employer demonstrates that its practice selects qualified workers – and that workers who are not selected are not qualified. If the height and weight minima had been job related in *Dothard*, workers smaller than 5 feet 2 inches and 120 pounds would have not been qualified for the job.

If a characteristic is a BFOQ for a job, a worker who lacks the characteristic is not qualified for the job. If a selection criterion is job related, a worker who fails the criterion is not qualified

for the job. It follows that the defenses in Disparate Treatment and Disparate Impact attack the plaintiff's evidence of the identical material fact, namely, qualifications, and this identity reinforces Justice Powell's theorem that Disparate Treatment and Disparate Impact are not distinct claims, but methods of proving the same claim.

For a more complete discussion of how each step in Disparate Treatment and Disparate Impact proves the elements of the claim of discrimination and the defenses, *see* Gold, *Towards a Unified Theory of the Law of Employment Discrimination* (2001).

C

Disparate Treatment and Disparate Impact constitute a scheme for classifying the methods of proving discrimination. The existence of an alternative classification scheme confirms Justice Powell's theorem.

Disparate Treatment and Disparate Impact together constitute a scheme for classifying the methods of proving discrimination. Another classification scheme is equally descriptive of the methods of proving discrimination, and this fact confirms Justice Powell's theorem.

Disparate Treatment and Disparate Impact classify the proof of discrimination according to how causation is established. The former proves causation with evidence of intent (an employer intentionally denied opportunities to a protected class), and the latter proves causation with evidence of effects (an employment practice had an adverse effect on a protected class and was not job related).

As we described Disparate Treatment, we found it necessary to mention that it came in two varieties: one relied exclusively on conventional evidence, and the other used both conventional and statistical evidence. We also pointed out that Statistical Disparate Treatment has much in common with – indeed, except for the proof of causation, is indistinguishable from – Disparate Impact. Therefore, an alternative to the Disparate Treatment/Disparate Impact classification scheme exists; the alternative focuses, not on how causation is proved, but on whether conventional or statistical evidence is used.

Under the alternative classification scheme, the theories or methods of proving discrimination are named "Conventional Proof" and "Statistical Proof." Conventional Proof is the same as the theory which we have previously called "Conventional Disparate Treatment." The evidence in cases described by Conventional Proof comprises only testimony and documents, for example *Thurston*, in which the airline would not allow captains over the age of 60 to transfer to the job of flight engineer.

The theory named "Statistical Proof" is the same as the theories we have previously called "Statistical Disparate Treatment" and "Disparate Impact." Statistical Proof uses statistical evidence – a proxy for the qualified labor pool, and a statistically significant disparity between the success rates of the plaintiffs and the comparators – to prove that the plaintiffs were qualified for and interested in the job, and that the employer denied or afforded the plaintiffs a lesser chance to benefit from the opportunity. Two varieties of Statistical Proof exist, one which proves causation with evidence of intent and another which proves causation with evidence of an adverse effect and the absence of job relatedness.

Our purpose is not to argue that this alternative classification scheme is superior to Disparate Treatment/Disparate Impact (though the alternative has the advantage of focusing attention on the nature of the evidence offered rather than on the inferences drawn from the evidence). Instead, our purpose is to emphasize the point that Disparate Treatment and Disparate Impact are not distinct claims, but a scheme for classifying the methods of proving the claim of discrimination. By whichever scheme the methods of proof are classified, the claim itself is not affected. Whole numbers can be classified as odd or even, prime or non-prime, perfect squares or not, but their fundamental character as whole numbers is not changed.

Nonetheless, the alternative classification scheme illuminates the issue in the case at bar. If Justice Stewart had classified the theories of proving discrimination as Conventional Proof and Statistical Proof instead of as Disparate Treatment and Disparate Impact, *see Int'l B'd Teamsters* at 335 n. 15, the issue in the case at bar would have been trivial: for no reasonable person would argue that Congress intended to disallow statistical evidence as proof of discrimination.

D

Although no longer true of Title VII because of the 1991 amendments, Justice Powell's theorem remains true of the Age Act.

Justice Powell's theorem is no longer true of Title VII, but the theorem remains true of the Age Act. Section 102 of the Civil Rights Act of 1991 provided compensatory and punitive damages for Disparate Treatment (intentional discrimination) but not for Disparate Impact. Therefore, under Title VII the intent to discriminate is no longer merely a way of proving causation; intent is now a material fact in the claim of Disparate

Treatment. Because the material facts of, and the relief for, Disparate Treatment and Disparate Impact now differ under Title VII, they are distinct claims under that statute. The Age Act, however, was not amended as Title VII was. In the pertinent regards, the Age Act is the same as Title VII was before 1991. It follows that Justice Powell's theorem remains true of the Age Act.

E

Courts traditionally recognize methods of proving claims that have been created by legislatures, and therefore it does not matter that Congress was unaware of Disparate Impact when the Age Act was passed. What does matter is that Disparate Impact proves discrimination.

When it passed the Age Act in 1967, Congress was not aware that discrimination could be proved by the Disparate Impact theory. *See* Gold, *Disparate Impact under the Age Discrimination in Employment Act of 1967* at 38-54. This fact would be crucial if the issue in the case at bar were whether to recognize a new claim under the act; a court should rarely if ever expand a statute to embrace a claim not envisioned by the legislature. The issue in the case at bar, however, is not whether to recognize a new claim; the issue is whether to recognize another method of proving an existing claim. For this reason, it does not matter that Congress was unaware of Disparate Impact. Recognizing methods of proving claims lies within the province of the judiciary. What matters, accordingly, is whether Disparate Impact does indeed prove discrimination – a question which this Court has answered in the affirmative since *Griggs v. Duke Power Company* (1971).

F

Disparate impact should be approved as a method of proving discrimination under the Age Act.

The Age Act outlaws age discrimination in employment. This Court has held that both Disparate Treatment and Disparate Impact prove discrimination. It follows that this Court should approve Disparate Impact as a method of proving age discrimination in employment.

II

EMPLOYMENT PRACTICES WITH A DISPARATE IMPACT ARE THE SORT OF EVIL THAT CONGRESS MEANT TO ERADICATE.

Liberty should not be restricted without good reason. Conduct that falls "within the letter of the statute and yet ... not within its spirit" should not be illegal. *Holy Trinity Church v. United States* at 459 (1892). We have established that Disparate Impact proves discrimination and, therefore, falls within the letter of the statute. Would eliminating practices with a Disparate Impact also serve the purposes of the statute? The answer is yes.

Practices that have a Disparate Impact on older workers fall within the evil at which the Age Act was aimed. That Disparate Treatment and Disparate Impact are indistinguishable except for the way causation is proved stands as strong evidence that both address the same evil. If one serves the purposes of the Age Act, so does the other. Examination of the purposes stated in the act leads to the same conclusion.

Congress stated its purposes plainly. One of them was

> ...to prohibit arbitrary age discrimination in employment....

Age Act, § 2(b). An employment practice that is not job related is arbitrary because it serves no legitimate need of the business. If an employment practice is not only arbitrary, but also discriminatory – if it favors younger workers over older workers, all of whom are willing and able to perform the work in question – the practice is an evil of the sort that Congress meant to eradicate.

Another purpose of the Age Act was

> ... to promote employment of older persons based on their ability rather than age ....

Id. A practice with a Disparate Impact on older workers **has one and only one effect:** it selects on the basis of age. This is directly contrary to the purpose of the act.

Recognizing Disparate Impact as a method of proving discrimination under the Age Act would serve the purposes of the act. It would ensure that older workers are indeed judged "based on their ability rather than age." *Id.*

CONCLUSION

Employment discrimination is like Janus: a creature with two faces but one body. The body is the single claim of discrimination that is recognized by the Age Act. The faces are Disparate Treatment and Disparate Impact, which are methods of proving the claim. As methods of proof, they establish the

same material facts. They both prove discrimination. It is unimportant that Congress was not aware of the Disparate Impact method of proof in 1967, for recognizing methods of proof is a function of the judiciary. This Court has held that Disparate Impact proves discrimination. An employment practice that has a Disparate Impact is not job related; it serves no legitimate interest of the business. The practice does only one thing: it selects on the basis of age, not ability. A practice with a Disparate Impact, therefore, incarnates the evil at which Congress directed the Age Act. For these reasons, Amici respectfully request that this Court reverse the judgment of the Court of Appeals for the Fifth Circuit and remand the case for further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

AZEL P. SMITH, *et al.*,
Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT TITLE VII'S "DISPARATE IMPACT" DOCTRINE DOES NOT EXTEND TO THE ADEA	8
A. The Considerations of History and Policy That Led This Court To Read Title VII Expansively in *Griggs* To Reach Facially-Neutral Practices That Operate as "Built In Headwinds" to Minorities Have No Parallels in the History and Policies of the ADEA	8
B. The Language and Legislative History of the ADEA Preclude Disparate Impact Claims	11
1. *A Natural Reading of Section 4(a) Indicates It Prohibits Only Intentional Discrimination*	11
2. *The Similarity Between the Language of Section 4(a) of the ADEA and Section 703(a) of Title VII Is Not a Sufficient Reason To Import the Disparate Impact Theory of Title VII into the ADEA*	12

TABLE OF CONTENTS—Continued

	Page
3. *The "Reasonable Factors Other Than Age" Exception of Section 4(f)(1) of the ADEA Further Confirms Congress' Intent To Prohibit Only Intentional Age Discrimination*	12
4. *The Legislative History of the ADEA Reflects Congress' Determination To Deal with Disparate Impact in the Age Context Through Proactive Programs, Rather Than Prohibitory Measures*	16
II. DISPARATE IMPACT ANALYSIS IS FUNDAMENTALLY UNSUITABLE FOR USE IN ADEA CASES	19
A. Monitoring the Impact of Employment Decisions by Age Is Impracticable and Would Not Yield Meaningful Information..	19
B. Because Age Correlates with Numerous Legitimate Factors Used To Differentiate Among Employees, a Rule Allowing Disparate Impact Claims Under the ADEA Would Severely Hamper the Ability of Employers To Manage Their Businesses	22
CONCLUSION	24

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Adams v. Florida Power Corp., 255 F.3d 1322 (11th Cir. 2001), *cert. dismissed as improvidently granted*, 507 U.S. 604 (2002)	3, 5
County of Washington v. Gunther, 452 U.S. 161 (1981)	13, 14, 15
Criley v. Delta Air Lines, Inc., 119 F.3d 102 (2d Cir. 1997)	5, 20
DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995)	5
EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984)	3
EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994)	5
EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999)	5, 20, 21
EEOC v. Wyoming, 460 U.S. 226 (1983)	*passim*
Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996)	5, 12, 15, 22
Finnegan v. Trans World Airlines, Inc., 976 F.2d 1161 (7th Cir. 1992)	22
Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000), *cert denied*, 532 U.S. 914 (2001)	3, 5, 12
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	*passim*
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	4, 6, 10, 13
Hiatt v. Union Pacific Railroad Co., 65 F.3d 838 (10th Cir. 1995)	3
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)	10, 13
Lowe v. Commack Union Free School District, 886 F.2d 1364 (2d Cir. 1989)	12
Lyon v. Ohio Education Association, 53 F.3d 135 (6th Cir. 1995)	5

TABLE OF AUTHORITIES—Continued

	Page
Markham v. Geller, 451 U.S. 945 (1981)	15
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	16
Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999)	5, 11, 15, 16
O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996)	20
Public Employees Retirement System v. Betts, 492 U.S. 158 (1989)	4
Shell Oil Co. v. Dartt, 434 U.S. 99 (1977)	4
Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996)	12
Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003)	8, 15, 16
Washington v. Davis, 426 U.S. 229 (1976)	12
CONSTITUTIONS	
U.S. Const. amend. XIV	12
FEDERAL STATUTES	
Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*	*passim*
29 U.S.C. § 621(a)(2)	18
29 U.S.C. § 621(a)(4)	18
29 U.S.C. § 621(b)	7, 18
29 U.S.C. § 623(a)	6, 11, 12, 13
29 U.S.C. § 623(f)(1)	6, 13
Equal Pay Act, 29 U.S.C. § 206(d)	13, 14
29 U.S.C. § 206(d)(1)	14
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*	*passim*
42 U.S.C. § 2000e-2(a)	6, 12
42 U.S.C. § 2000e-2(k)(1)(A)(i)	8

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
Employment Policy Foundation Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Mar. 2003)	19
Eric Neel, *Forever Young*, ESPN.com, Apr. 26, 2002	10
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IN THE

Supreme Court of the United States

No. 03-1160

AZEL P. SMITH, *et al.*,
Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Respondents City of Jackson, Mississippi, *et al.*[1] Written consent of all parties has been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to eliminating discriminatory

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation of the brief.

employment practices. Its membership comprises over 330 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched knowledge of the practical, as well as legal ramifications of equal employment opportunity policies and requirements. EEAC's members are firmly committed to the principles of non-discrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621 *et seq.*, and other equal employment opportunity statutes and regulations. As employers, and as potential targets of employment discrimination charges and lawsuits, EEAC's members have a substantial interest in the issue presented for the Court's consideration in this case—*i.e.*, whether the "disparate impact" theory of discrimination is available under the ADEA.

EEAC members' interest in this issue is rooted in important, practical concerns. As a result of aging and normal career advancement patterns, older workers as a group tend to hold higher-level, higher-paid, and longer-established positions of employment, and to have different levels of experience and different kinds of skills and abilities, than their younger counterparts. Because of these natural correlations, innumerable business decisions and practices, even though age-neutral in intent, inevitably tend to impact older workers differently than younger ones. Some of these decisions and practices work to the older workers' advantage; others tend to benefit younger workers. Examples of the latter could include workforce reductions designed to cut salary and benefit costs; business restructurings designed to make organizations less top-heavy; plant-closings and relocations of operations accompanied by significant personnel turnover; changes in technologies and methods of operation that require

workers with new or different skills; and salary adjustments designed to improve hiring and retention of employees in entry-level and relatively low-level positions, to name just a few. A rule of law forbidding employers to implement such changes, or forcing employers to justify such decisions by proving business necessity—and perhaps to refute claims that alternatives with less age-based adverse impact exist—would severely impair the ability of EEAC members and other employers to manage their businesses.

EEAC members also are concerned about the issue at stake in this case because of the enormous practical difficulties of applying disparate impact analysis in the ADEA context. Because aging is progressive, the age composition of every employer's workforce is in constant flux, and the impact of any employment practice or business decision on employees in different age groupings is constantly changing. Consequently, a rule making employers liable for unintended consequences of employment practices that fall more heavily on an older group would effectively require employers to engage in constant monitoring and to make endless statistical comparisons of the impact of virtually every conceivable criterion and practice on employees of every age, and no employer could ever be certain of being in compliance for more than a day at a time.

Because of such concerns, EEAC over the years has filed *amicus* briefs addressing this issue in several other cases before this Court and in various circuit courts.[2] EEAC also has participated in a number of other cases before this Court

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[2] *E.g.*, *Adams v. Florida Power Corp.*, No. 01-584, *cert. dismissed as improvidently granted*, 507 U.S. 604 (2002) (per curiam); *Frank v. United Airlines, Inc.*, No. 00-948, *cert. denied*, 532 U.S. 914 (2001); *Hiatt v. Union Pac. R.R. Co.*, 65 F.3d 838 (10th Cir. 1995); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984).

involving the ADEA.[3] In short, EEAC has substantial interest in, and familiarity with, the issues and policy concerns presented to the Court in this case. Because of its experience in these matters, EEAC is well-suited to brief the Court on implications of the issues extending beyond the immediate concerns of the parties.

STATEMENT OF THE CASE

This case involves a performance pay plan implemented by the City of Jackson police department. The petitioners are police and public safety officers, all over the age of 40 when the plan was implemented. They challenge the plan under the ADEA, alleging violations under both the "disparate treatment" and "disparate impact" theories of discrimination. According to the petitioners, the plan gave proportionately larger raises to officers and dispatchers with five or fewer years of tenure than to those with more than five years of tenure.

In their disparate impact claim, the petitioners contend that, regardless of its motives, the department violated the ADEA in implementing the plan, because its effects were less favorable to officers and dispatchers 40 years of age and older than to their younger counterparts. They note that most of those 40 and older had more than five years of tenure, while most with five or fewer years of tenure were younger than 40.

The district court granted summary judgment for the city. On appeal, the Fifth Circuit affirmed the judgment insofar as it dismissed the disparate impact claim.[4] The court

[3] *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158 (1989); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977) (per curiam).

[4] The court of appeals vacated the district court's judgment insofar as it dismissed the disparate treatment claim. It concluded that the district court had acted prematurely in granting summary judgment on that claim, because it had not yet ruled on pending discovery motions in which the

thus joined the four other circuits that have ruled that the disparate impact theory is not available as a means of proving discrimination under the ADEA.[5]

SUMMARY OF ARGUMENT

The court below was correct in holding that the disparate impact theory of discrimination cannot be used to establish a violation of the ADEA. The disparate impact theory is rooted in considerations of history and policy that lie at the heart of Title VII of the Civil Rights Act of 1964, but have no parallel in the ADEA. Title VII rests on the premise that race and other immutable characteristics have no intrinsic bearing on ability. Hence, shortfalls in minority groups' performance on standardized tests and other measures of ability are seen as results of "built-in headwinds" of the historic discrimination Title VII was designed to eradicate. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

The ADEA, however, is grounded on a fundamentally different premise—*i.e.*, not that age bears no relation to ability, but rather that its effects on ability vary so from one individual to another that it is arbitrary and unfair to base employment opportunities on age-based generalizations. *See EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). Thus, the

plaintiffs had sought to compel production of evidence that arguably could have been relevant to the disparate treatment issue.

[5] *See Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001). *See also DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995) (questioning viability of ADEA disparate impact claims in dicta); *Lyon v. Ohio Educ. Ass'n*, 53 F.3d 135 (6th Cir. 1995) (same). *But see Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (holding disparate impact theory available under ADEA); *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2d Cir. 1997) (approving limited form of disparate impact claims under ADEA); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999) (same).

focus of the ADEA's prohibitory section is on age stereotyping, a form of discrimination that is fully addressed by the disparate treatment theory. As this Court aptly put it in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA."

The similarity in the wording of Title VII's and the ADEA's prohibitory sections does not afford a sufficient reason to import the disparate impact theory of the former into the age discrimination context of the latter. When Congress borrowed language from Section 703(a) of Title VII as a pattern for Section 4(a) of the ADEA in 1967, *Griggs* had not yet been decided, and Title VII generally was understood to cover only intentional discrimination. That understanding reflects a natural reading of statutory language that makes it unlawful to discriminate against or to limit, segregate, or classify employees "because of" personal characteristics, such as race, sex or age. That this Court subsequently found extra-textual reasons to give that language a more expansive reading in *Griggs*, against the unique background of Title VII, does not warrant applying the same gloss to the similar language of the ADEA.

Differences in other provisions of the two statutes reinforce the conclusion that the ADEA's prohibitory language does not reach beyond intentional discrimination. One key difference is the inclusion in the ADEA of a provision that has no counterpart in Title VII—*i.e.*, Section 4(f)(1) of the ADEA, which expressly permits differentiation in employment "based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). As this Court has observed, Congress included that provision in the ADEA specifically "to insure that employers were permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33. To allow disparate impact claims based on age-neutral criteria that merely correlate with age would effectively negate that

assurance, and thus cannot be what Congress intended in enacting the ADEA.

Unlike Title VII, moreover, the text of the ADEA draws an explicit distinction between "arbitrary age discrimination" and "problems arising from the *impact* of age on employment" and adopts different approaches to dealing with these two separate problems. 29 U.S.C. § 621(b) (emphasis added). It addresses "arbitrary age discrimination" through prohibitory measures, but declares a proactive federal policy "to help employers and workers find ways of meeting the problems arising from the impact of age on employment." *Id.*

Beyond these textual and historic differences, there are compelling public policy reasons to conclude that the ADEA's prohibitory language should not be given the same expansive reading as Title VII's. As a practical matter, the disparate impact theory is fundamentally unsuitable for use in ADEA cases. Were this Court to recognize disparate impact claims under the ADEA, employers would be severely hampered in their ability, for instance, to manage business downturns through the use of layoffs or reductions in force. Moreover, because age is not a static, group trait like the immutable characteristics protected under Title VII, but rather is progressive and individual, the age composition of the class protected under the ADEA is constantly changing, as is the age composition of every subgroup within that protected category. The result is to make it exceedingly difficult to monitor employment practices for age-based disparate impact, and virtually impossible for employers to achieve and maintain statistical parity by age.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT TITLE VII'S "DISPARATE IMPACT" DOCTRINE DOES NOT EXTEND TO THE ADEA

After a careful and well-reasoned analysis of the "well-traversed arguments on either side of this debate," *Smith v. City of Jackson*, 351 F.3d 183, 187 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724 (2004), the court below correctly concluded that the "disparate impact" theory of discrimination developed by the courts under Title VII of the Civil Rights Act of 1964, and subsequently adopted by Congress in a 1991 amendment to that statute,[6] cannot properly be extended to cases of age discrimination under the ADEA. That conclusion finds strong support in the differences in the history and purposes of Title VII and the ADEA, as well as in textual differences between the two statutes.

A. The Considerations of History and Policy That Led This Court To Read Title VII Expansively in *Griggs* To Reach Facially-Neutral Practices That Operate as "Built-in Headwinds" to Minorities Have No Parallels in the History and Policies of the ADEA

Neither the language of the ADEA, nor the original Title VII language after which the ADEA's prohibitory provisions were patterned, contains any reference to disparate impact. Rather, the disparate impact theory of discrimination is a judicially-created doctrine based on an interpretation of Congress' intent in enacting Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[6] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

In construing Title VII in *Griggs* to reach not only intentional discrimination, but also the use of standardized tests, diploma requirements and other employment policies and practices that are fair in form but have disparate impact against African-Americans and other minority groups protected by that statute, this Court looked past Title VII's prohibitory language and focused primarily on its unique history and broad remedial purposes. Writing for the unanimous Court, Chief Justice Burger emphasized the objective of that statute "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30. Observing that "[b]asic intelligence must have the means of articulation to manifest itself fairly in a testing process," the Court traced the disparate impact of the standardized tests and diploma requirements at issue in *Griggs* directly to a long history of "inferior education in segregated schools," *id.* at 430, that operated as "'built-in headwinds' for minority groups." *Id.* at 432.

Implicit in *Griggs* is a recognition that race and other immutable characteristics protected by Title VII have no intrinsic bearing on basic intelligence or ability. Therefore, disparities in protected groups' performance on standardized tests and other purported measures of ability must be seen as lingering effects of the historic discrimination Title VII was enacted to eradicate. It was against this background that the Court concluded in *Griggs* that "Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation." *Id.*

The ADEA, however, rests on a fundamentally different premise. It does not presume that age and ability are completely unrelated. Indeed, such a proposition would fly in the face of common experience. For example, one need only consider the occasional sports-page paean to some ex-

ceptional athlete who has managed to continue competing past the age of 40 to be reminded that most ordinary mortals' physical strength and endurance tend to wane as age advances.[7]

Nor is the ADEA predicated on any history of widespread, discriminatory animus of the sort that led to the enactment of Title VII. On the contrary, as this Court observed in *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983), Congress recognized in enacting the ADEA that "age discrimination rarely was based on the sort of animus motivating some other forms of discrimination." *Cf. Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) ("Older persons . . . unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment'") (citations omitted).

Instead, the focus of the ADEA is on the unfairness of generalizing about individuals' abilities based on their age, rather than looking at their *actual* abilities. As this Court recognized in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* at 610. Accordingly:

> [T]he ADEA commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.' The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

Id. at 611 (citation omitted).

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[7] *E.g.*, Michael Virtanen, *Older Athletes Test Their Stamina*, Assoc. Press, Nov. 12, 2003; Martin Miller, *Raising the Bar at 40*, L.A. Times, Sept. 29, 2003; Eric Neel, *Forever Young*, ESPN.com, Apr. 26, 2002, *available at* http://espn.go.com/page2/s/neel/020426.html, at 1 ("John Stockton . . . is 40 and he's playing point [guard] in the [NBA] playoffs . . . . Wrap your mind around that for a minute").

In sum, the ADEA's prohibitions are aimed at the problem of stereotyping, a form of discrimination that is fully addressed under the disparate treatment theory. For in the absence of a discriminatory motive, "the problem of inaccurate and stigmatizing stereotypes disappears . . . even if the motivating factor is correlated with age." *Id.* Thus, the disparate impact theory "captures the essence of what Congress sought to prohibit in the ADEA," *id.* at 610, and is fully sufficient to the effectuation of the ADEA's purposes, without importing the more problematic disparate treatment theory from the jurisprudence of Title VII.

B. The Language and Legislative History of the ADEA Preclude Disparate Impact Claims

1. *A Natural Reading of Section 4(a) Indicates It Prohibits Only Intentional Discrimination*

Section 4(a), the prohibitory section of the ADEA, states in pertinent part that it shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment *because of* such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's age.

29 U.S.C. § 623(a) (emphasis added). "A commonsense reading of this statement strongly suggests that the statute includes a requirement of intentional discrimination." *Mullin v. Raytheon Co.*, 164 F.3d 696, 700 (1st Cir. 1999). Indeed, as one appeals court has observed, "[i]t would be a stretch to read the phrase 'because of such individual's age' to prohibit incidental and unintentional discrimination that resulted because of employment decisions which were made for reasons

other than age." *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir. 1996).

2. *The Similarity Between the Language of Section 4(a) of the ADEA and Section 703(a) of Title VII Is Not a Sufficient Reason To Import the Disparate Impact Theory of Title VII into the ADEA*

The few courts that have found room in the ADEA for disparate impact claims have relied heavily on the similarity between the wording of Section 4(a) of the ADEA, 21 U.S.C. § 623(a) and that of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000); *Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir. 1996); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1369 (2d Cir. 1989). There is no doubt that, in enacting the ADEA in 1967, Congress used the language of Section 703(a) of Title VII as a model. Importantly, however, that was four years *before* this Court handed down its decision in *Griggs*. Up to that point, discrimination had been defined in the law primarily in cases construing the Equal Protection Clause of the Fourteenth Amendment, which had equated it with adverse action motivated by unlawful intent. *See Washington v. Davis*, 426 U.S. 229, 238-48 (1976). Accordingly, it is reasonable to infer that such intentional discrimination, and not disparate impact, was what Congress had in mind in 1967 when it modeled the prohibitory language of the ADEA after that of Title VII.

3. *The "Reasonable Factors Other Than Age" Exception of Section 4(f)(1) of the ADEA Further Confirms Congress' Intent To Prohibit Only Intentional Age Discrimination*

The conclusion that Congress intended the ADEA to prohibit only intentional discrimination because of age is reinforced by the inclusion in the ADEA of provisions that

further define the contours of that statute, but have no parallel in Title VII. Chief among these is Section 4(f)(1) of the ADEA, which provides in pertinent part that "it shall not be unlawful for an employer . . . to take any action otherwise prohibited [by Section 4(a)] . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).

As this Court has pointed out, Congress included this "reasonable factors other than age" (RFOA) exception in the ADEA specifically "to insure that employers were permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33. Lest there were any doubt, this Court subsequently made clear that neutral criteria cannot be deemed to be dependent on age simply because they are "*correlated* with age." *Hazen Paper v. Biggins*, 507 U.S. at 611 (emphasis added).

In other words, while the RFOA exception "makes clear that '[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly,'" *Kimel*, 528 U.S. at 88 (quoting *Hazen Paper*, 507 U.S. at 611), it also insures that when an employer *does* rely directly on a factor other than age, such as productivity, the employer cannot be found in violation of the ADEA simply because the factor it relied on has disparate impact against older workers. Thus, the RFOA exception contained in Section 4(f)(1) is simply incompatible with an interpretation of Section 4(a) that would allow disparate impact claims under the ADEA.

Further support for this conclusion can be drawn from the Court's interpretation of a similar statutory provision—the "factor other than sex" provision of the Equal Pay Act (EPA)—in *County of Washington v. Gunther*, 452 U.S. 161 (1981). In *Gunther*, the Court held that the Bennett Amendment to Title VII, which prohibits wage discrimination claims where the pay differential in question is authorized by

the EPA, effectively incorporates into Title VII the EPA's four affirmative defenses, including the defense for differentials based on "any other factor other than sex." 29 U.S.C. § 206(d)(1). The Court rejected the argument that the defense already was implicit in Title VII, and stated that the defense "could have significant consequences for Title VII litigation [involving alleged sex-based pay discrimination]." *Gunther*, 452 U.S. at 170. In doing so, the Court intimated that the "factor other than sex" defense was inconsistent with the *Griggs* disparate impact doctrine and suggested that the defense appeared to have been designed to limit the application of the EPA to disparate treatment claims. *Id.* at 170-71.

The Court noted in *Gunther* that Title VII was designed not only to prohibit "overt discrimination," but also to proscribe "practices that are fair in form, but discriminatory in operation." *Id.* (citation omitted). In contrast, the Court observed:

> The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

Id. (citation and footnote omitted). The Court concluded that, unlike Title VII, the EPA was structured to prohibit only intentional, sex-based discrimination. Thus, an employer that makes a compensation decision based on some "factor other than sex" will not violate the EPA, even if that factor has a disproportionately adverse impact on women.

Noting the similarity between the EPA's "factor other than sex" defense and the ADEA's "reasonable factor other than age" exception, several courts have recognized *Gunther* as

further support for disallowing disparate impact claims under the ADEA. *See Mullin v. Raytheon Co.*, 164 F.3d at 702; *Ellis v. United Airlines*, 73 F.3d at 1008; *Smith v. City of Jackson*, 351 F.3d at 192. The First Circuit said in *Mullin*:

> When the ADEA's general prohibition and the statutory exception are read in *pari materia*, as a unified whole, the prohibition forbids disparate treatment based on age and the exception authorizes disparate impact. Thus, Professor Laycock's commentary, made in the Equal Pay Act context, applies equally to the ADEA: "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

Mullin, 164 F.3d at 702 (quoting Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Prob. 53, 55 (1986)). *Cf. Markham v. Geller*, 451 U.S. 945, 949 (1981) (Rehnquist, J., dissenting from denial of petition for writ of certiorari) (noting that the ADEA "provides that it shall not be unlawful for an employer to take any action otherwise prohibited 'where the differentiation is based on reasonable factors other than age'").

The use of the word "reasonable" in the RFOA provision is fully consistent with the conclusion that the provision precludes disparate impact claims under the ADEA. Both the term "bona fide"—used by this Court in *Gunther* to describe the "factor other than sex" defense under the EPA—and the term "reasonable"—as it is used in the ADEA's RFOA exception—in essence describe the same concept in the context of employment policies and practices. Both denote, in this context, a factor that is legitimate on its face and not asserted as a pretext for intentional discrimination. Indeed, this Court's Title VII "disparate treatment" decisions use the term "reasonable" in this same way, often equating it with

a rational or facially-legitimate explanation for an employment decision or practice. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (noting that if plaintiff has produced enough evidence of unlawful intent to survive directed verdict, employer must offer "a *reasonable* basis" for its action) (emphasis added). Thus, the phrase "reasonable factor other than" in the ADEA has essentially the same meaning as "other factor other than" in the EPA, and therefore has the same preclusive effect on disparate impact claims.

The First Circuit also noted in *Mullin* that, since Title VII contains no provision comparable to the ADEA's RFOA exception, "this difference in the statutory schemes further distinguishes *Griggs*." 164 F.3d at 702 n.5. In the same vein, the Fifth Circuit declared in this case:

> At the very least, we recognize the "reasonable factors other than age" exception is a clear textual difference between the ADEA and Title VII regarding employer liability—a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate impact claim under Title VII (as set forth in *Griggs*) controls the cognizability of a disparate impact claim under the ADEA.

Smith v. City of Jackson, 351 F.3d at 193 (footnote omitted).

4. *The Legislative History of the ADEA Reflects Congress' Determination To Deal With Disparate Impact in the Age Context Through Proactive Programs, Rather Than Prohibitory Measures*

As this Court recounted in *EEOC v. Wyoming*, 460 U.S. at 229-33, the passage of the ADEA was strongly influenced by the contents of a 1965 report submitted to Congress by then-Secretary of Labor Willard Wirtz in accordance with a

directive incorporated in Title VII.[8] After conducting a study of the factors that tended to result in age discrimination in employment, Secretary Wirtz concluded:

> The gist of the matter is that "discrimination" means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example —race. It means in connection with the age question, furthermore, several different things.

Secretary's Report at 5.

The report went on to draw a distinction between what it termed "arbitrary discrimination" on the basis of age—*i.e.*, discrimination based on assumptions about people's ability resulting from age-based stereotypes—and problems resulting from factors that "affect older workers more strongly as a group than they do younger workers." *Id.* at 11.[9] The latter type of problem, which the report also described as "institutional arrangements that indirectly restrict the employment of older workers," plainly equates to practices that have disparate impact on the basis of age. *Id.* at 15.

It is highly significant, therefore, that the report recommended two distinctly different approaches to these two problems. It recommended that "arbitrary discrimination" on the basis of age be prohibited by federal legislation, but that

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[8] U.S. Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report to Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcom. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 201-29 (1965) (hereinafter cited as "Secretary's Report").

[9] As examples of such factors, the report mentioned health differentials between younger and older workers, the lower educational attainment of older workers, changes in technology, and possible lowering of productivity. Secretary's Report at 15.

the problem of institutional arrangements that disadvantage older workers be addressed through programmatic measures such as training and education to prepare workers for job changes and reduce their vulnerability to displacement. *Id.* Most significantly, for present purposes, the report did *not* recommend that Congress outlaw those practices that "affect older workers more strongly as a group." *Id.* at 21-22.

Congress ultimately adopted this two-pronged approach in the ADEA and expressly outlined it in the legislation's Statement of Findings and Purpose. 29 U.S.C. § 621. The dual aspects of the problem, as previously delineated in the Secretary's Report, are recognized in the ADEA's finding that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). Yet only one of those aspects—"arbitrary discrimination in employment because of age"—is recognized as "burden[ing] commerce and the free flow of goods in commerce." 29 U.S.C. § 621(a)(4). It follows that Congress did not view the problem of "practices [that] may work to the disadvantage of older persons" as a burden on interstate commerce to be encompassed by the ADEA's prohibitory provisions. 29 U.S.C. § 621(a)(2).

This conclusion is confirmed in the Act's declaration of purpose. Section 2(b) of the ADEA states:

> It is therefore the purpose of this chapter to promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b). Again, this declaration reconfirms that, just as Secretary Wirtz had recommended, Congress aimed the ADEA's prohibitory provisions only at "arbitrary employment discrimination," while addressing "impact of age on employment" through proactive measures.

II. DISPARATE IMPACT ANALYSIS IS FUNDAMENTALLY UNSUITABLE FOR USE IN ADEA CASES

A. Monitoring the Impact of Employment Decisions by Age Is Impracticable and Would Not Yield Meaningful Information

Disparate impact analysis under Title VII depends on statistics comparing the effects of employment policies or practices on different, specific protected groups—*e.g.*, the effect of a given hiring criterion on African-Americans compared to its effect on whites, or the effect of an employer's reduction-in-force criteria on women compared to their effect on men. Unlike the immutable traits covered by Title VII, however, age is a progressive condition that affects everyone, but in different degrees and at different times. Most workers eventually attain the age of 40, joining the class of individuals protected under the ADEA, and continue to age with the passage of time. As a result, the class of all ADEA-protected individuals changes each day. In 2004, for instance, an estimated 12,263 people in the United States (6,055 men and 6,208 women) on average turned 40 each day.[10] Given the inherent mutability of age, it is impossible to associate a single business decision or event with any single age-protected group.

Prudent employers typically monitor the impact of their selection practices on minorities and women as an early warning device to avoid potential liability under Title VII. If

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[10] Employment Policy Foundation Tabulation of Census Bureau/ Bureau of Labor Statistics Current Population Survey (Mar. 2003) (microdata records public use file at http://www.bls.census.gov/cps/cpsmain.htm).

this Court were to adopt a rule allowing disparate impact claims under the ADEA, similar prudence would dictate that employers also monitor their selection practices for age-based adverse impact. As a practical matter, however, such monitoring would be exceedingly difficult in the age context, and to achieve and maintain statistical parity by age would be virtually impossible, since the age composition of any given group is constantly changing and never static from one day to the next.

A related problem is that, because age is a continuous variable rather than a dichotomous one, it may be used to divide individuals into innumerable groupings for purposes of comparisons. While any employer's workforce can be divided neatly into two groups--those who are within the ADEA's protection and those who aspire to be—simple, two-group comparisons may not be sufficient for ADEA purposes. For, under this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), comparators for purposes of assessing potential age discrimination need not be outside the protected class.

Thus, the statistical comparisons on which disparate impact analyses depend present serious problems in the age context, *see, e.g.*, Ramona L. Paetzold & Steven L. Wilborn, *The Statistics of Discrimination* § 7.11 (West 2002). Yet efforts to correct for such problems through the use of statistical techniques such as "age-break analysis" (*i.e.*, comparisons based on selected age subgroups) are prone to yield unreliable and even "paradoxical" results. *Id.* at § 7.03.

As the Second and Eighth Circuits have concluded, comparing age subgroups simply does not work. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951

(8th Cir. 1999). In *McDonnell Douglas*, the Eighth Circuit elaborated:

> [I]f disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in an [sic] RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force. Adoption of such a theory, moreover, might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes. . . . We have held that employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination. We certainly do not think that Congress intended to impose liability on employers who rely on such criteria just because their use had a disparate impact on a subgroup.

Id. (citations omitted).

Although the Eighth Circuit's discussion in *McDonnell Douglas* was aimed specifically at the problems associated with disparate impact analysis in the context of age subgroups, the same sorts of practical difficulties surround any use of the disparate impact theory under the ADEA. Attempting to discern whether a business practice has produced an unintended, yet adverse, effect on some group of older workers—whether it be the entire class of those 40 and older or some subgroup—necessarily would require age-based analyses of the employer's entire workforce, since the class of protected persons is guaranteed to change every day. Congress certainly did not mean to impose such an onerous—if not utterly impossible—task on employers under the ADEA, whose aim was to prohibit only arbitrary, intentional ageism.

B. Because Age Correlates with Numerous, Legitimate Factors Used To Differentiate Among Employees, a Rule Allowing Disparate Impact Claims Under the ADEA Would Severely Hamper the Ability of Employers To Manage Their Businesses

To a far greater extent than other legally-protected traits, age routinely correlates with factors employers legitimately use to differentiate among individuals in the workplace, including seniority, experience, educational attainment, salary levels and many others. Indeed, as the Seventh Circuit has noted, "virtually all elements of a standard compensation package" correlated with age and, therefore, could not be curtailed in times of business adversity without creating prima facie violations of law if the disparate impact theory were recognized under the ADEA. *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164-65 (7th Cir. 1992). The court concluded that such a construction of the ADEA would lead to results so patently unsatisfactory—indeed, "so remote from the objectives of civil rights law"—that it must be rejected. *Id.* at 1165.

Again, because of the progressive nature of age—especially when coupled with normal career patterns and the inexorable, albeit individualized, physical effects of aging—there are innumerable, facially-neutral selection criteria and other employment practices whose effects on individuals will differ depending on their age at the time a business decision is made. *Ellis v. United Airlines*, 73 F.3d at 1009; *see also* Miles F. Archer, Case Note, *Mullin v. Raytheon Company: The Threatened Vitality of the Disparate Impact Theory Under the ADEA*, 52 Me. L. Rev. 149, 171 (2000). As a result of these correlations, the practical effect of a rule allowing disparate impact claims under the ADEA would be to limit severely the ability of business managers to implement decisions of the sort they are required to make day-in and day-out.

For example, workforce reductions designed to cut salary and benefit costs could be in jeopardy under an ADEA/ disparate impact theory, because older workers tend to have higher salaries and more expensive benefits. Similarly, restructurings designed to make management more efficient and less top-heavy could be in trouble, because higher-level positions tend to be held by older individuals. Likewise, plant closings, relocations of operations, and changes in operating methods or technologies that result in significant employee turnover all could be challenged, because newly-hired employees at all levels are likely to be younger on average than the incumbents they replace, simply as a result of the normal operation of the labor market. Finally, salary plan adjustments designed to improve an organization's competitiveness in hiring and retention of employees in entry-level and relatively low-level positions could be vulnerable to disparate impact analysis, because those positions are likely to be held by relatively young workers.

It is no real solution to say that employers might be able to avoid liability for such actions by showing that the factors they relied upon were reasonable or that they were justified by business necessity (and perhaps also rebutting assertions that there were alternatives through which they could have achieved their legitimate business objectives with less adverse impact on older workers), as would be required in a Title VII disparate impact case. For, given the costs and uncertainties of litigation, the reality is that, if employers know a potential for ADEA liability under the disparate impact theory is in the picture, many will feel compelled to manage their businesses in such a way as to come as close as possible to age-parity with respect to the impact of all such decisions, as difficult and limiting as that may be. This

simply cannot be a result that Congress intended in enacting the ADEA.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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v.

CITY OF JACKSON, MISSISSIPPI, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY 2

ARGUMENT 4

I. THE LONGSTANDING REGULATORY INTERPRETATIONS OF THE ADEA RECOGNIZE THE RFOA PROVISION AS AN APPROPRIATE DEFENSE TO DISCRIMINATION CAUSED BY FACIALLY NEUTRAL PRACTICES 4

A. The DOL Regulations Interpreted the ADEA to Prohibit Age-Neutral Practices That Adversely Affected Older Workers, Unless Justified as Job-Related Under the Section 4(f)(1) Defense. 5

B. The DOL Regulations Are Consistent with the Statute and its Legislative History.. 8

C. EEOC's Longstanding Regulations of the RFOA Defense Track the DOL's Interpretations. 11

D. The Regulations of Both the DOL and EEOC are Entitled to *Chevron* Deference.. 12

II. THE CONTEXT AND LANGUAGE OF THE RFOA PROVISION ESTABLISH IT AS AN AFFIRMATIVE DEFENSE TO A VIOLATION OF § 4(a) CAUSED BY A NON-AGE FACTOR 15

A. The OWBPA Exemplifies Congress' Intent that the Provisions in ADEA § 4(f) Do Not Define the Act's Prohibitions. 15

B. Congress Uses the Prefatory Language "Any Action Otherwise Prohibited" to Signify an Affirmative Defense. 19

C. The Placement of the RFOA Provision Contiguous to the ADEA's Affirmative Defenses Strongly Supports Construction of the Provision as an Affirmative Defense. 20

D. The RFOA Defense Does Not Operate as a Denial of An Intent to Discriminate 22

III. THE RFOA PROVIDES A FEASIBLE DEFENSE TO PROVING AGE DISCRIMINATION UNDER A DISPARATE IMPACT THEORY. 24

A. The Term "Reasonable" in ADEA § 4(f)(1) Requires The Employer to Show That the Age-Neutral Factor is Job-Related 24

B. The Disparate Impact Method of Proof Insures that Employment Criteria are Job-Related 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases PAGE(S)

Adams v. Florida Power Corp.,
255 F.3d 1322 (11th Cir. 2001), *writ dismissed as improvidently granted*, 535 U.S. 228 (2002) . . . 4, 25

Adreani v. First Colonial Bankshares Corp.,
154 F.3d 389 (7th Cir. 1998) 25

Allen v. Entergy Corp., Inc.,
193 F.3d 1010 (8th Cir. 1999) 28

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535 U.S. 212 (2002) 2, 14

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394 U.S. 741 (1969) 13

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 2, 5, 12

DiBiase v. SmithKline Beecham Corp.,
48 F.3d 719 (3d Cir. 1995) 4

Dothard v. Rawlinson,
433 U.S. 321 (1977) 6

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449 U.S. 590 (1981) 13

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41 F.3d 1073 (7th Cir. 1994) 4, 25

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73 F.3d 999 (10th Cir. 1996) 4, 10, 25

Evers v. Alliant Techsystems, Inc.,
241 F.3d 948 (8th Cir. 2001) 28

General Dynamics Land Systems, Inc. v. Cline,
124 S. Ct. 1236 (2004) 16, 23

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 6, 8, 12, 27

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 25

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 20

Mahoney v. Radio Free Europe/Radio Liberty, Inc.,
818 F. Supp. 1 (D.D.C. 1992), *rev'd on other grounds*,
47 F.3d 447 (D.C. Cir. 1995) 21

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411 U.S. 792 (1973) 22

Mullin v. Raytheon Co.,
164 F.3d 696 (1st Cir. 1999) 4, 25

Public Employees Retirement System v. Betts,
492 U.S. 158 (1989) 3, 15, 16, 18

Russello v. United States,
464 U.S. 16 (1983) 24

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998 F.3d 1466 (8th Cir. 1996) 28

Smith v. City of Jackson,
351 F.3d 183 (5th Cir. 2003) 4, 5, 13

Smith v. Xerox Corp.,
196 F.3d 358 (2d Cir. 1999) 28

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450 U.S. 248 (1981) 22

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469 U.S. 111 (1985) 20, 21

UAW v. Johnson Controls, Inc.,
499 U.S. 187 (1991) 26

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434 U.S. 192 (1977) 23

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386 U.S. 361 (1967) 19

United States v. Mead Corp.,
533 U.S. 218 (2001) 14

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348 U.S. 528 (1955) 24

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472 U.S. 400 (1985) ..... *passim*

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537 U.S. 36 (2002) 13

Zubar v. Allen,
396 U.S. 168 (1969) 13

Statutes

Age Discrimination in Employment Act of 1967,
29 U.S.C. §§ 621 et seq
§ 4(a), 29 U.S.C. § 623(a) ..... *passim*
§ 4(f)(1), 29 U.S.C. § 623(f)(1) ..... *passim*
§ 4(f)(2), 29 U.S.C. § 623(f)(2) 9, 18, 19, 23
§ 4(f)(2)(A), 29 U.S.C. §623(f)(2)(A) 23
§ 4(f)(2)(B), 29 U.S.C. §623(f)(2)(B) 17
§ 4(f)(2)(B)(i), 29 U.S.C. § 623(f)(2)(B)(i) 23
§ 4(f)(3), 29 U.S.C. § 623(f)(3) 18
29 U.S.C. § 628 (1968) 12
29 U.S.C. § 630(l) 17

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§ 105, 105 Stat. 1071 (1991) 27

Older Americans Act Amendments of 1984,
Pub. L. No. 98-459, §802(c)(1),
98 Stat. 1767 (1984) 21

Older Workers Benefit Protection Act of 1990,
Pub. L. No. 101-433, §§ 101-03 (1990) .. 3, 15, 17, 18

Pub. L. No. 89-602,
§ 606, 78 Stat. 265 (1966) 6

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §§ 2000e *et seq.*
§ 703(h), 42 U.S.C. §2000e-2(h) 18
§ 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) .. 27

Regulations

Department of Labor:
29 C.F.R. § 860.102(b) (1970) 10
29 C.F.R. §§ 860.103-04 (1970) 5
29 C.F.R. § 860.103(a) (1970) 11
29 C.F.R. § 860.103(b) (1970) 11
29 C.F.R. § 860.103(c) (1970) 11
29 C.F.R. § 860.103(d) (1970) 11
29 C.F.R. § 860.103(e) (1970) 10, 11
29 C.F.R. § 860.103(f) (1970) 6, 10
29 C.F.R. § 860.103(f)(1) (1970) 7
29 C.F.R. § 860.103(f)(1)(i) (1970) 8, 12
29 C.F.R. § 860.103(f)(1)(iii) (1970) 8
29 C.F.R. § 860.103(f)(2) (1970) 6
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29 C.F.R. § 860.104(b) (1970) 6, 7, 10

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29 C.F.R. § 1625.7 (1981) 11
29 C.F.R. § 1625.7(a) (1981) 11
29 C.F.R. § 1625.7(b) (1981) 11
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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association (NELA), founded in 1985, is a voluntary organization of over 2,000 attorneys who specialize in representing individuals in workplace controversies. It is the country's only professional membership organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm dedicated to using trial lawyers' skills and resources to advance the public good. TLPJ specializes in precedent-setting and socially significant individual and class action litigation. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance civil rights and civil liberties, workers' rights, consumer and victims' rights, environmental protection and safety, toxic torts, the preservation of the civil justice system, and the protection of the poor and powerless. TLPJ is dedicated to fighting discrimination in the workplace, schools, and places of public accommodation. It has litigated numerous discrimination cases under federal civil rights statutes.

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[1] The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae* National Employment Lawyers Association (NELA) and Trial Lawyers for Public Justice, P.C. (TLPJ) state that no counsel for either party authored any portion of this brief. No persons other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Based on NELA's and TLPJ's experience and expertise in litigating discrimination cases, NELA and TLPJ believe that to combat discrimination in the workplace effectively, employers must be subject to liability for facially neutral practices that have an unjustified disparate impact based on protected characteristics. This holds true for discrimination in violation of the Age Discrimination in Employment Act (ADEA), just as it does for discrimination in violation of Title VII of the Civil Rights Act. Disparate impact theory provides an important mechanism for policing arbitrary practices and stereotypes, which is critical to achieving the goals of the ADEA.

SUMMARY OF ARGUMENT

The ADEA's "reasonable factors other than age" (RFOA) provision, 29 U.S.C. § 623(f)(1), has long been recognized by the Department of Labor (DOL) and Equal Employment Opportunity Commission (EEOC) as a defense to a claim that a facially neutral practice discriminates based on age. The DOL's interpretations applying the RFOA provision to discriminatory tests and physical fitness standards are entitled to considerable deference not only because they were issued contemporaneously with the ADEA's effective date, but because they were written by the same administration that drafted the ADEA and the Wirtz Report documenting the problems of age discrimination in both facially discriminatory and neutral practices. *See Zubar v. Allen*, 396 U.S. 168, 192 (1969). EEOC's subsequent regulations are also entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because they continued the substance of the DOL's interpretations, and are a reasonable and longstanding construction of the ADEA. *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

Construing the RFOA provision to limit the ADEA's prohibitions to intentional discrimination, as the court below did, runs afoul of the clear directive by Congress that the ADEA's defenses do not define the discrimination deemed to be "arbitrary" under the statute. In overruling *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), and enacting the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No. 101-433, §§ 101-03 (1990), Congress made clear that the ADEA's prohibitions reach all forms of discrimination and that its defenses establish the standards for determining when discrimination may be excused.

Adherence to Congress' directives as to the proper statutory construction of the ADEA leads to the conclusion that the ADEA prohibits discrimination in facially neutral practices, with the RFOA defense determining whether such discrimination may be excused. The specific language of the RFOA provision "to take any action otherwise prohibited" together with "factors other than age" presumes that a violation of ADEA Section 4(a) has been established due to the adverse effects on older employees of a non-age related practice. The placement of the RFOA provision with the affirmative defenses in ADEA Section 4(f)(1), 29 U.S.C. § 623(f)(1), strongly supports the conclusion that the RFOA is an appropriate defense to a claim that a facially neutral practices violates ADEA Section 4(a), 29 U.S.C. § 623(a).

The reasonableness qualifier of the RFOA defense requires employers to prove that the neutral employment standard is job-related and consistent with business necessity. Establishing that a practice is an RFOA would demonstrate that the criteria are fair and reasonable measures of one's ability to perform the job. Allowing older employees to prove age discrimination using the disparate impact method insures that practices that adversely affect

older workers are subjected to an objective scrutiny to eliminate arbitrary discrimination in the workplace.

ARGUMENT

I. THE LONGSTANDING REGULATORY INTERPRETATIONS OF THE ADEA RECOGNIZE THE RFOA PROVISION AS AN APPROPRIATE DEFENSE TO DISCRIMINATION CAUSED BY FACIALLY NEUTRAL PRACTICES.

According to the circuit court decisions rejecting disparate impact theory in ADEA cases, one of the primary obstacles is the reasonable factors other than age provision in ADEA § 4(f)(1).[2] Based on a cursory analysis, the circuit courts reason that the RFOA provision precludes challenges to facially neutral practices by limiting the scope of the ADEA's prohibitions in § 4(a) to intentional discrimination.

All of the courts that reject disparate impact theory in ADEA cases, however, fail completely to mention the Department of Labor interpretations issued contemporaneously with the ADEA that applied the RFOA as an affirmative defense to a showing that a facially neutral practice violated the statute.[3] The court below curtly dismissed

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[2] *See Smith v. City of Jackson*, 351 F.3d 183, 190 (5th Cir. 2003); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325-26 (11th Cir. 2001), *writ dismissed as improvidently granted*, 535 U.S. 228 (2002) ; *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (10th Cir. 1996); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995); *EEOC v. Frances W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994).

[3] *Id.*

the longstanding regulations of the Equal Employment Opportunity Commission that expressly recognized that the ADEA applies to disparate impact claims with the RFOA as the appropriate defense. *Smith v. City of Jackson*, 351 F.3d 183, 189 n. 5 (5th Cir. 2003).

The regulations of both the Department of Labor and the EEOC are clearly relevant and should be given considerable deference, rather than wholly ignored as the lower courts have done. The longstanding regulations of both agencies construe the ADEA to prohibit discrimination in facially neutral practices subject to a sufficient business justification under the RFOA defense. In other words, the regulations state the elements of a defense in a disparate impact method of proof for ADEA cases. Unless the regulations are shown to be unreasonable, they are entitled to great deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. The DOL Regulations Interpreted the ADEA to Prohibit Age-Neutral Practices That Adversely Affected Older Workers, Unless Justified as Job-Related Under the § 4(f)(1) Defense.

Just days after the ADEA took effect, the Department of Labor issued interpretive regulations of the new statute. 33 Fed. Reg. 9172 (1968), 29 C.F.R. §§ 860.103-04 (1970). The contemporaneous DOL interpretations provide significant insight into the meaning and application of the RFOA provision in ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1), particularly since they were written by DOL Secretary Wirtz, whose admiristration also drafted the bill that became the ADEA to implement the recommendations contained in his 1965 report to Congress. *See* 113 Cong. Rec. 1377 (1967) *reprinted in* LEGISLATIVE HISTORY OF THE

AGE DISCRIMINATION IN EMPLOYMENT ACT 62-63, 68-69 (hereinafter "LEG. HIST.").[4]

The DOL interpreted the RFOA provision as an affirmative defense to discrimination caused by non-age related factors. As examples of "differentiations based on reasonable factors other than age," DOL identified physical fitness standards, 29 C.F.R. § 860.103(f), employee tests, 29 C.F.R. § 860.104(b), quantity or quality of production and educational requirements. 29 C.F.R. § 860.103(f)(2). These practices are the very types of facially neutral practices that have since been commonly challenged under the disparate impact method of proof in Title VII cases. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (tests); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (physical fitness standards).

Years before this Court recognized that Title VII prohibited discrimination caused by facially neutral practices such as employee tests, the DOL interpreted the ADEA to prohibit employee testing unless the test "specifically

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[4] REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (JUNE 1965), *reprinted in* LEG. HIST., at 16-41 (1965) (Hereinafter cited as the "WIRTZ REPORT"). Following the Wirtz Report, Congress directed the Secretary of Labor to submit legislative recommendations to include:

> Provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.

Pub. L. No. 89-602, § 606, 78 Stat. 265 (1966). In response to Congress' request, Senator Yarborough introduced the "President's recommendation" as S. 830 on February 3, 1967. 113 Cong. Rec. 2467-2476 (1967), *reprinted in* LEG. HIST., at 66, 68-70.

related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated." 34 Fed. Reg. 322 (January 9, 1969); 29 C.F.R. § 860.104(b) (1970). Citing the advantage that younger test takers would have over older test takers, the regulations imposed the burden on the employer to justify such tests as job-related "to ensure that the test is for a permissible purpose." *Id.*

The Wirtz Report specifically found that educational and testing requirements disadvantaged older workers. ("Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly. . . ." WIRTZ REPORT at 3). Senator Yarborough, the floor manager of the ADEA, also believed that the RFOA provision would apply to arbitrary discrimination in employment testing:

> For example, if a test shows that a man cannot do certain things. . . . If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply.

113 Cong. Rec. 31,253 *reprinted in* LEG. HIST. at 144.

A similar parallelism exists between the regulations' application to physical fitness standards and the Wirtz Report's documentation of the arbitrariness of many physical requirements. Section 860.103(f)(1) of the DOL's regulations recognized that physical fitness standards may be a "reasonable factor other than age." The regulation tracked the findings of the Wirtz Report, which documented how employers had commonly used fitness requirements to restrict the hiring of older workers, yet had no basis for such requirements. WIRTZ REPORT at 4. The regulation interpreted the RFOA defense to permit fitness requirements if "such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job

category, regardless of age." 29 C.F.R. § 860.103(f)(1)(i) (1970). The defense would not justify "an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform. . . ." 29 C.F.R. § 860.103(f)(1)(iii) (1970).

If the regulations had only required uniform and equal application of fitness standards to all ages to satisfy the RFOA defense, the defense could be viewed as limited to intentional discrimination. But by requiring employers to demonstrate that fitness standards were also "reasonably necessary" and job-related, the regulations applied the RFOA defense to unintentional discrimination caused by neutral practices.

Most importantly, the DOL regulations clearly set forth a job-related standard in determining the reasonableness of the factors other than age upon which the employer acted. The interpretation of the RFOA provision in the DOL regulations is remarkably similar and prescient to the elements of an employer's defense to a disparate impact claim set forth by this Court in *Griggs v. Duke Power*, 401 U.S. 424 (1971). As the Court emphasized in *Griggs*, "any tests used must measure the person for the job and not the person in the abstract." 401 U.S. at 436. That is precisely how the DOL interpreted the requirements of the RFOA provision of the ADEA.

B. The DOL Regulations Are Consistent with the Statute and its Legislative History.

A thorough study of the 1968 DOL regulations, the Wirtz Report, and the ADEA's prohibitions and defenses reveals a remarkable parallelism that can be traced to Secretary Wirtz's extensive involvement in the development of each

document.[5] The Wirtz Report found that explicit age limits precluding the hiring of workers above a certain age were the most common and obvious form of age discrimination. WIRTZ REPORT at 6. The Report also identified the existence of several "institutional arrangements that indirectly restrict[ed] the employment of older workers." WIRTZ REPORT at 15. The Report in effect recognized the different forms in which age discrimination appeared: facially discriminatory practices and facially neutral practices.

The Wirtz Report examined "institutional arrangements" that operated to restrict the employment of older persons, such as: (1) "arbitrary rules which ignore individual differences," (2) "[p]romotion-from-within-policies," (3) seniority systems, (4) workers' compensation laws, and (5) private pension, health, and insurance plans. WIRTZ REPORT at 15-17.

By providing specific defenses[6] that corresponded to discrimination in the institutional arrangements set forth in the Wirtz Report,[7] Congress must have intended the ADEA's prohibitions to reach such discrimination. The

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[5] *See See* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AMER. UNIV. L. REV. 1071, 1099-1107 (1998) (in depth examination of Wirtz Report, development of ADEA's prohibitions and defenses, and DOL Regulations).

[6] The ADEA does not explicitly deal with the issue of workers' compensation laws, which the Wirtz Report mentions as one problematic area. *See* Fentonmiller, *supra*, note 5 at 1102. The two defenses in ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2), aligned with the last two institutional arrangements discussed in the Wirtz Report, to deal with seniority systems and employee benefit plans.

[7] *See also* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLORIDA L. REV. 229, 295-96 (1990).

inclusion of these defenses in the statute negates the argument that Congress chose to deal with facially neutral practices that disadvantaged older workers through "programmatic measures." *See Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996).

The first defense in ADEA § 4(f)(1) corresponds to explicit age limits, which would be unlawful except in narrow circumstances defined by the bona fide occupational defense (BFOQ). 29 U.S.C. § 623(f)(1). *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). The DOL interpretive regulations provided examples of possible BFOQs consistent with the statute and the Wirtz Report.

The second defense, the RFOA provision, responds to "[a]rbitrary rules which ignore[d] individual differences" and "[p]romotion-from-within-policies." WIRTZ REPORT at 15. The DOL regulations continued this parallelism with the statute and the Wirtz Report, providing detailed examples of "arbitrary rules" that would be subject to the RFOA provision, specifically identifying employee tests and physical fitness requirements. 29 C.F.R. §§ 860.103(f), 860.104(b) (1970).

The DOL interpretations further stated that both the BFOQ and RFOA defenses in ADEA § 4(f)(1) "must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer. . . ." 29 C.F.R. §§ 860.102(b), 860.103(e) (1970).

The DOL interpreted the ADEA to prohibit discrimination in age-neutral, as well as explicitly age-based, policies and practices. The regulations recognized the parallelisms of the Wirtz Report between the problems of facially discriminatory and facially neutral arrangements, and the statutory defenses designed to address these problems.

C. EEOC's Longstanding Regulations of the RFOA Defense Track the DOL's Interpretations.

Since EEOC assumed jurisdiction over the ADEA in 1979, it too has interpreted the ADEA to prohibit discrimination in facially neutral practices subject to sufficient business justification by the RFOA defense. 29 C.F.R. § 1625.7 (1981). A close reading of EEOC's regulations reveals that they essentially track DOL's interpretations and condense them by eliminating the examples DOL had provided.[8]

EEOC addressed the general application of the RFOA defense to neutral standards, such as tests, in section (d) of its regulations:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an

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[8] Section (a) of both agencies' regulations recites the statutory provision. *See* 29 C.F.R. § 1625.7(a) (1981); 29 C.F.R. § 860.103(a) (1970). Section (b) of EEOC's regulations condenses sections (b) and (d) of DOL's interpretations. *Compare* 29 C.F.R. § 1625.7(b) (1981) *with* 29 C.F.R. §§ 860.103(b), (d) (1970). Section (c) of EEOC's regulation tracks DOL's section (c) to emphasize that the RFOA provision does not apply when age is a limiting criterion. *Compare* 29 C.F.R. § 1625.7(c) (1981) *with* 29 C.F.R. § 860.103(c) (1970). Section (e) of both agencies' interpretations imposes the burden of proof on the employer to establish the RFOA defense. *Compare* 29 C.F.R. § 1625.7(e) (1981) *with* 29 C.F.R. § 860.103(e) (1970). Finally, section (f) of the EEOC's regulations corresponds to section (h) of DOL's regulations. *Compare* 29 C.F.R. § 1625.7(f) (1981) *with* 29 C.F.R. § 860.103(h) (1970). EEOC eliminated the additional examples of RFOAs that DOL had included in 29 C.F.R. § 860.104, but referenced the example of discriminatory tests in 29 C.F.R. § 1625.7(d).

> adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth in Part 1607 of this Title.

29 C.F.R. § 1625.7(d) (1981).

For the first time, EEOC used the term "adverse impact" to describe the discrimination caused by a facially neutral practice, and "business necessity" to describe the job-related requirement of the RFOA defense. Of course such terms were unknown at the time the DOL issued its regulations in 1968. By the time EEOC assumed jurisdiction over the ADEA, these terms had come into the legal lexicon as the elements of proving discrimination under the disparate impact theory. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971).

To suggest that EEOC's use of these terms constitutes a significant departure from DOL's regulations is to place form over substance at the highest degree. Despite the labels EEOC used in its regulations, the essence of its interpretation of the RFOA provision tracked the DOL's interpretation that the RFOA defense applied to facially neutral practices unless justified "as reasonably necessary for the specific work to be performed." *See* 29 C.F.R. § 860.103(f)(1)(i) (1970).

D. The Regulations of Both the DOL and EEOC are Entitled to *Chevron* Deference.

Since Congress gave the DOL and EEOC the authority to issue rules and regulations to implement the ADEA, *see* 29 U.S.C. § 628, their interpretations are entitled to great deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Moreover,

because nothing in the text of the ADEA clearly precludes its application to facially neutral policies, the agencies' interpretations must receive deference unless they are unreasonable. *See Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36, 46 (2002). Yet, the court below did not even consider the DOL's regulations and disregarded EEOC's interpretations as not entitled to *Chevron* deference, finding a lack of "significant analysis." *Smith v. City of Jackson*, 351 F.3d 183, 189 n. 5 (5th Cir. 2003).

Although both agencies designated their ADEA regulations as "interpretive rules," *Chevron* deference is still appropriate. This Court previously found the consistent interpretive rules of ADEA § 4(f)(1) by DOL and EEOC as persuasive authority. *See Western Airlines Inc. v. Criswell*, 472 U.S. 400, 412 (1985). NELA and TLPJ submit that both the DOL and EEOC regulations should be recognized as reasonable and authoritative constructions of the ADEA for several reasons.

First, the DOL interpretations were issued contemporaneously with the effective date of the statute, entitling them to substantial deference. *See Bingler v. Johnson*, 394 U.S. 741, 749-50 (1969). Second, the DOL regulations were drafted and issued by Secretary Wirtz, who also authored the administration's bill that became the ADEA and the report to Congress prompting enactment of the ADEA. *See, e.g., Zubar v. Allen*, 396 U.S. 168, 192 (1969) (departmental interpretation of a statute carries the most weight when specifically interpreted by administrators who participated in its drafting). Third, the interpretations are consistent with the statute and its legislative history as demonstrated by the parallel treatment of discrimination caused by facially neutral practices such as employment and fitness tests. Fourth, the DOL regulations remained consistent and unchanged throughout the DOL's jurisdiction of the ADEA. *See EEOC v. Associated Dry Goods*,

Corp., 449 U.S. 590, 600 (1981) (contemporaneous construction deserves special deference when it has remained consistent over a long period of time). Finally, Congress was clearly aware of the DOL's interpretations of the RFOA and did not act to alter the agency's construction of the statute when considering other amendments to the ADEA. *See, e.g., Improving the Age Discrimination Law*, SENATE SPECIAL COMM. ON AGING, 93rd Cong. 1st Sess. at 12, 33-44 (1973) *reprinted in* LEG. HIST., at 229, 238-244 (stated that RFOA applied to tests and included DOL's regulations in report).

For similar reasons, EEOC's regulations are also entitled to *Chevron* deference. Contrary to the Fifth Circuit's view, EEOC engaged in a thorough study of the ADEA's interpretations and undertook a formal rulemaking process. Two days before EEOC assumed jurisdiction of the ADEA, the agency issued notice in the Federal Register that it had undertaken a complete review of all of the DOL's interpretations of the ADEA. 44 Fed Reg. 37,974 (1979). Five months later, EEOC issued proposed interpretations of the ADEA for notice and comment. 44 Fed Reg. 68,858 (1979). After careful review of the comments, EEOC made changes to the proposed regu'ations. 46 Fed. Reg. 47,724 (1981).

EEOC's regulations reflect careful deliberation and a "relatively formal administrative procedure," which support full *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). Furthermore, Congress endorsed EEOC's regulations and court decisions concluding that the RFOA is an affirmative defense. *See* 1 LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT, at 253-54, 348-49 (1990) (hereinafter cited as "OWBPA LEG. HIST."). Finally, *Chevron* deference is warranted because EEOC's interpretations have been consistent and longstanding. *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

II. THE CONTEXT AND LANGUAGE OF THE RFOA PROVISION ESTABLISH IT AS AN AFFIRMATIVE DEFENSE TO A VIOLATION OF § 4(a) CAUSED BY A NON-AGE FACTOR.

Section 4(f)(1) of the ADEA states:

> It shall not be unlawful for an employer, employment agency, or labor organization ——
>
> (1) *to take any action otherwise prohibited* under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or *where the differentiation is based on reasonable factors other than age*. . . .

29 U.S.C. § 623(f)(1) (2000) (emphasis added).

A. The OWBPA Exemplifies Congress' Intent that the Provisions in ADEA § 4(f) Do Not Define the Act's Prohibitions.

The proper analysis to apply in construing the ADEA's defenses related to the Act's prohibitions and purposes is obviously central to the Court's resolution of this case. Courts unwilling to accept a disparate impact theory in ADEA cases make a fundamental error in construing the RFOA provision to narrow the Act's prohibitions.

NELA and TLPJ submit that Congress clearly precluded the statutory construction of the ADEA used by the court below, when it resoundingly rejected the same approach in overruling *Public Employees Retirement System v. Betts*, 492 U.S. 158, 181 (1989), and enacting the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, §§ 101-03 (1990) ("OWBPA"). In Congress' view, the proper analysis to apply is to broadly define discrimination in the

ADEA's prohibitions and to use the Act's defenses to set the standards for determining when that discrimination may be excused. Applying Congress' view of the proper construction of the ADEA, the ADEA's prohibitions reach facially neutral practices and the RFOA provision sets forth an affirmative defense which can exempt certain justifiable practices.

This Court acknowledged in *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236, 1245 n. 7 (2004), that Congress revised the judicial construction of the ADEA used in *Public Employees Retirement System v. Betts*, 492 U.S. 158, 181 (1989) (. . . "with the 1990 amendments it meant to overrule *Betts*."). Congress could not have been clearer that the *Betts* approach to construing the ADEA was wrong. The OWBPA "explicitly and completely rejects both the reasoning and the holding in *Betts*." 1 OWBPA LEG. HIST., at 20 (Statement of Managers Explaining the Bill).

In enacting the OWBPA, Congress expressly disagreed with and overruled both the reasoning and conclusion in *Betts* that ADEA § 4(f)(2) merely redefined the conduct prohibited by ADEA § 4(a). In *Betts*, the Court interpreted the employee benefit plan provision in ADEA § 4(f)(2) to "redefine[ ] the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act." 492 U.S. at 181. Relying as well on the ADEA's purpose to prohibit arbitrary discrimination, the Court reasoned that discrimination in employee benefits was not the type of arbitrary discrimination that was intended to be covered in the general prohibitions of ADEA § 4(a).

In overruling *Betts*, the OWBPA rejected a narrow reading of the ADEA's purpose to prohibit "arbitrary discrimination" as a basis for restricting the reach of the ADEA's prohibitions. Congress confirmed that the

"ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits." 1 OWBPA LEG. HIST., at 20 .

The OWBPA also provides clear congressional confirmation that the ADEA's prohibitions are to be interpreted "like the comparable provisions of Title VII" because the ADEA's prohibitions were taken *in haec verba* from Title VII. H.R. Rep. No. 101-664, at 33 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 240 (1990). To reinforce the continued parallelism between the ADEA's prohibitions and Title VII's prohibitions, Congress deliberately did not amend ADEA § 4(a) in 1990. *Id*. Instead, to correct the Court's holding that § 4(a) did not cover discrimination in employee benefits, Congress added a provision to the definitions section of the statute to include employee benefits within the meaning of the § 4(a) phrase "compensation, terms, conditions, or privileges of employment." Pub. L. No. 101-433, §§ 102 (1990), codified at 29 U.S.C. § 630(l).

To correct the Court's reasoning and holding that discrimination in employee benefits was not arbitrary, Congress amended the ADEA's defense for employee benefit plans, 29 U.S.C. § 623(f)(2)(B) (2000), not the ADEA's prohibitions. The defense defines the circumstances under which an employer could justify age discrimination. *See* S. Rep. No. 101-263, at 17-18 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 336-37 (1990); H.R. Rep. No. 101-664, at 33-34 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 240-41 (1990). In amending ADEA § 4(f)(2), Congress emphasized that the defense "provides a sound mechanism for harmonizing two purposes of the ADEA . . .: eradicating arbitrary discrimination based on age and promoting the hiring of older persons." *Id*.

Finally, the OWBPA overturns the Court's conclusion that ADEA § 4(f)(2) was a definitional provision and not a

defense, by explicitly imposing the burden of proof on the employer to establish the elements of § 4(f)(2). Pub. L. No. 101-433, § 103 (1990), codified as 29 U.S.C. § 623(f)(2). In *Betts*, the Court reasoned that the seniority system provision in ADEA § 4(f)(2), like the seniority system provision in Title VII § 703(h), 42 U.S.C. § 2000e-2(h), was a definitional provision and not an affirmative defense. *Betts*, 492 U.S. at 181-82. The OWBPA specifically overturns this reasoning by reiterating that all of the defenses in ADEA § 4(f)(2) are true affirmative defenses on which the employer bears the burden of persuasion to establish the elements of the defense. *See S.1511 Final Substitute: Statement of Managers*, 1 OWBPA LEG. HIST., at 25 (1990).[9]

The OWBPA exemplifies the proper analysis to use in determining whether the RFOA provides a defense in the disparate impact methodology of proof. In contrast, construing the RFOA to redefine the ADEA's prohibitions against arbitrary discrimination repeats the erroneous judicial construction in *Betts* that was rejected by the OWBPA. The statutory analysis directed by Congress in the OWBPA leads to the conclusion that the RFOA provision operates as an affirmative defense to a claim of discrimination caused by a facially neutral practice.

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[9] The versions of the OWBPA prior to final passage included ADEA §§ 4(f)(1) and (3), and specifically imposed the burden of proof for ADEA § 4(f)(1) on the employer. *See* S. Rep. No. 101-263, at 2 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 321 (1990); H.R. Rep. No. 101-664, at 3 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 210 (1990). The final Statement of Managers deleted reference to ADEA §§ 4(f)(1) and (3) from the bills because the *Betts* decision did not interpret those provisions. *See S.1511 Final Substitute: Statement of Managers*, *id.* at 25.

B. Congress Uses the Prefatory Language "Any Action Otherwise Prohibited" to Signify an Affirmative Defense.

The RFOA defense begins with a specific proviso: "to take any action otherwise prohibited." 29 U.S.C. § 623(f)(1). This prefatory phrase means that the RFOA provision does not come into play until a violation of an ADEA prohibition has been established. When a party seeks to have a violation excused by asserting an exception to liability, that party typically bears the burden of proving that its conduct falls within the exception. *See United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967).

Congress views the prefatory language "to take any action otherwise prohibited" as creating an affirmative defense. Based on its understanding of this proviso, Congress added this very language to ADEA § 4(f)(2) in the OWBPA, to clearly make it an affirmative defense. 1 OWBPA LEG. HIST., at 253-54, 348-49.

Prior to 1990, ADEA § 4(f)(2) did not include the prefatory language from ADEA § 4(f)(1). ADEA § 4(f)(2) stated:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan. . . which is not a subterfuge to evade the purposes of this Act. . . .

29 U.S.C. § 623(f)(2) (1989).

The OWBPA's amendment to ADEA § 4(f)(2) adding the prefatory language from § 4(f)(1) is important because it reflects Congress' understanding of the meaning and effect of a key phrase in § 4(f)(1). Congress stated:

> the language of section 4(f) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . *to take any action otherwise prohibited*" by

the ADEA (emphasis added) has been incorporated as part of section 4(f)(2). . . .

1 OWBPA LEG. HIST., at 348. Congress used the prefatory language from § 4(f)(1) to make unmistakably clear that the addition of this language to § 4(f)(2) imposed two conditions: (1) the condition precedent of a violation of § 4(a), and (2) the employer bore the burden of establishing the elements of the defense. *See* S. Rep. No. 101-263, at 29-30 (1990), *reprinted in* 1 OWBPA LEG. HIST. at 348-49; H.R. Rep. No. 101-664 (1990), at 46-47, *reprinted in* 1 OWBPA LEG. HIST., at 253-54.

In so doing, Congress confirmed its understanding that the prefatory language in § 4(f)(1) had the same effect. Congress also expressed its approval of the circuit court decisions and EEOC's regulations concluding that the reasonable factors other than age exception included in § 4(f)(1) was an affirmative defense for which the employer bears the burden of proof. *Id.*

C. The Placement of the RFOA Provision Contiguous to the ADEA's Affirmative Defenses Strongly Supports Construction of the Provision as an Affirmative Defense.

The placement of a provision within the context of the statute provides particular insight into its meaning. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). The RFOA provision of the ADEA is sandwiched between the BFOQ provision and the foreign workplace provision. This Court has repeatedly held that the BFOQ provision is an affirmative defense. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n. 24 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985). The foreign workplace provision has also been recognized as an

affirmative defense.[10] The contiguous placement of the RFOA provision with these other affirmative defenses certainly suggests that it too is an affirmative defense.

The BFOQ and RFOA provisions have been juxtaposed to each other from the earliest drafts of the ADEA proposed by the Johnson Administration. *See* H.R. Rep. No. 90-13054 & S. Rep. No. 90-830 (1967), *reprinted in* LEG. HIST., at 94 & 127. Their contiguous relationship is no accident, and implies that the defenses were joined together to be interpreted similarly. *See* EGLIT, AGE DISCRIMINATION, § 5.16 at 5-64-67 (2d ed. 1995).

The first part of ADEA § 4(f)(1) provides an affirmative defense to classifications that are facially discriminatory. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 122. The action "otherwise prohibited" by § 4(a) is the explicit use of age in the terms of the policy or practice. *Id.* The BFOQ defense in § 4(f)(1) provides the appropriate response to intentional discrimination because the employer admits it used age as a qualification, but seeks to justify its action by showing that the use of age as a criterion is bona fide and reasonably necessary to the operation of the business. *Western Air Lines, Inc. v. Criswell*, 472 U.S. at 411.

The "reasonable factors other than age" defense provides the second part of ADEA § 4(f)(1). Again, the prefatory language requires that an action violating § 4(a) has been established. The language in the RFOA provision "factor

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[10] The foreign workplace defense was added to the ADEA in 1984 by § 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767, 1792. *See Mahoney v. Radio Free Europe/Radio Liberty, Inc.*, 818 F. Supp. 1, 4 (D.D.C. 1992), *rev'd on other grounds*, 47 F.3d 447 (D.C. Cir. 1995) (construing foreign employee provision as an affirmative defense). *See also* Eglit, AGE DISCRIMINATION, § 5.61 at 5-276 (2d ed. 1995).

other than age" connotes that the second defense in ADEA § 4(f)(1) responds to classifications that are not age-related, or in other words are facially neutral, since the BFOQ defense responds to facially discriminatory policies. The contiguous design of the two defenses to address facially discriminatory and facially neutral practices reflects Congress' concern with both intentional and unintentional discrimination. The placement and context of the RFOA provision clearly supports reading the provision as a defense to facially neutral actions that violate ADEA § 4(a)

D. The RFOA Defense Does Not Operate as a Denial of An Intent to Discriminate.

A denial that an action was motivated by age responds to a claim that the employment action was motivated by age. A simple denial of discrimination is the appropriate response to a prima facie claim of intentional discrimination under the *McDonnell Douglas* model of proof. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Response by denial means that the plaintiff's evidence does not establish an action "otherwise prohibited" by § 4(a), since a prima facie case based on circumstantial evidence merely raises an inference of discrimination that does not shift the burden of proof to the employer. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

In contrast, the RFOA defense does not logically or structurally operate as a denial of intentional discrimination.[11] None of the language in ADEA § 4(f)(1) suggests

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[11] *See* Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not the Question: Some Thoughts on Impact* (continued...)

that the provision includes or responds to an element of intent to discriminate.

When proof of intent to discriminate is part of a claim or its corresponding defense, Congress clearly includes language imposing an intent requirement. Again, the OWBPA amendments to ADEA § 4(f)(2) are instructive. Prior to the OWBPA, the bona fide seniority system and employee benefit plan provisions in § 4(f)(2) contained the phrase "subterfuge to evade the purposes of this Act." 29 U.S.C. § 623(f)(2) (1989). In *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), the Court interpreted this phrase as requiring evidence of an intent to discriminate.[12]

The OWBPA removed the phrase "subterfuge to evade the purposes" from ADEA § 4(f)(2). *See* S. Rep. No. 101-263, at 18 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 337 (1990); H.R. Rep. No. 101-664, at 34 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 241 (1990). The ADEA's defense for employee benefit plans is now a clear, objective showing of increased cost, without any inquiry into the intent of the employer. 29 U.S.C. § 623(f)(2)(B)(i) (2000). *Id.*

In contrast, the ADEA's seniority system provision continues to require proof of intent by virtue of the OWBPA. By adding the phrase "not intended to evade the purposes of this Act" to the seniority system provision, Congress continued to require the element of intent in this defense. *See* § 4(f)(2)(A), 29 U.S.C. § 623(f)(2)(A) (2000).

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[11] (...continued)
Analysis Under the Age Discrimination in Employment Act, 31 U. RICH. L. REV. 819, 832-33 (1997).

[12] *See General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236, 1245 n. 7 (2004) (noting that Congress overturned the *McMann* decision in the 1978 amendments to the ADEA).

This deliberate exclusion of language requiring evidence of intent in subpart B of § 4(f)(2), and inclusion in subpart A, demonstrates that Congress acted purposefully to impose the elements of intent or compliance with the purposes of the Act in the ADEA's defenses. *See Russello v. United States*, 464 U.S. 16, 23 (1983) *(quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

The absence of language in ADEA § 4(f)(1) of an intent requirement or an element related to the purposes of the ADEA strongly suggests that Congress drafted the provision to preclude any inquiry into these elements in establishing the underlying violation in § 4(a) or the RFOA defense. To construe the RFOA provision as a response to intentional discrimination ignores the deliberate omission of key language in § 4(f)(1).

III. THE RFOA PROVIDES A FEASIBLE DEFENSE TO PROVING AGE DISCRIMINATION UNDER A DISPARATE IMPACT THEORY.

A. The Term "Reasonable" in ADEA § 4(f)(1) Requires The Employer to Show That the Factor is Job-Related.

The language of ADEA § 4(f)(1) requires that the "factors other than age" must be "reasonable." Neither the statute nor its legislative history provides a definition of the term "reasonable." *See* EGLIT, AGE DISCRIMINATION, § 5.16 at 5-64-67 (2d ed. 1995). The term "reasonable" must be given effect, however. *See United States v. Menasche*, 348 U.S. 528, 539-40 (1955) (court's duty to give effect to every clause and word of a statute "rather than to emasculate an

entire section.") It cannot be ignored as the courts rejecting disparate impact theory under the ADEA have done.[13]

The question whether a neutral factor is "reasonable" under a disparate impact theory applying the RFOA provision differs in type and degree from whether an employer's response to a claim of disparate treatment is legitimate. Applying the Court's reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), legitimate in this context simply means not prohibited by the ADEA.

In contrast, Black's defines "reasonable" as "fair, proper, just, moderate, or suitable under the circumstances." BLACK'S LAW DICTIONARY 1138 (5th ed. 1979). A legitimate reason is not the same as a reasonable factor, given the Court's analysis in *Hazen Paper*. For example, an employer's response to an ADEA disparate treatment claim could be a reason such as race or pension vesting that violates another statute, but is not unlawful under the ADEA. *Hazen Paper*, 507 U.S. at 611. Such a response would not be reasonable because it would subject the employer to liability for other claims.

The reasonableness requirement of the RFOA provision also makes the defense inappropriate as a response to a disparate treatment claim because the disparate treatment theory does not permit inquiry into the "reasonableness," fairness, justness, or propriety of the employer's actions. *See Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 398 (7th Cir. 1998). Under the disparate treatment method of proof, the employer's actions may be unreasonable or unfair or arbitrary, yet not intentionally discrimi-

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[13] *See Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), *writ dismissed as improvidently granted*, 535 U.S. 228 (2002); *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996); *EEOC v. Frances W. Parker School*, 41 F.3d 1073 (7th Cir. 1994).

natory. *See also* L. STEVEN PLATT & CATHY VENTRELL-MONSEES, AGE DISCRIMINATION LITIGATION, § 14.180 (2000).

A "reasonable factor" clearly connotes something more and different than a legitimate factor. The context of the RFOA suggests that the term "reasonable" imposes an objective requirement that the factor be related to an individual's ability to do the job.[14]

The meaning of "reasonable factor" as job-related is reflected by its juxtaposition to the BFOQ defense. Immediately preceding the language "reasonable factors other than age," Congress used the term "*reasonably* necessary" to describe the relationship between a "bona fide occupational qualification" and the "normal operation of the particular business." 29 U.S.C. § 623(f)(1). The BFOQ defense focuses on the employee's ability to do the job. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). By following the BFOQ defense, a plausible reading of the term "reasonable factors" would be factors related to the job requirements or job performance, given the context of the term within the statute.

The degree of reasonableness would depend on the circumstances of the case. In the BFOQ context, reasonably necessary means the employer is compelled to use age as a proxy for the job-related qualifications. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985). The term "reasonably necessary" must mean more than a "rational basis in fact," since this Court rejected such a rationality standard for a BFOQ as inconsistent with the ADEA in *Western Air Lines, Inc. v. Criswell*, 472 U.S. at 420, n. 30.

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[14] *See* Player, *supra*, note 11, at 840-41; Kaminshine, *supra*, note 7, at 302.

The Court has described the employer's response to a disparate impact claim under Title VII as a "*reasonable* measure of job performance" with the "touchstone [a]s business necessity." *Griggs v. Duke Power*, 401 U.S. 424, 431, 436 (1971). Similarly, Title VII requires that the particular employment practice causing a disparate impact must be job related and "consistent with business necessity." 42 U.S.C. §2000e-2(k)(1)(A)(i).[15]

The absence of the term "necessary" in the RFOA defense implies that the employer is not compelled to use the factors it chose. However, because the employer bears the burden of proving the RFOA defense, allowing any rationale would not justify excusing the violation of § 4(a). Rather, the language and context of the defense suggest an intermediate burden on the employer to demonstrate the reasonableness of its action. The employer's justification should be more than a mere rationality, but less than absolute necessity.

The business necessity standard of *Griggs* would be consistent with the intermediate burden posed by the RFOA defense. Neutral practices can unfairly target ageist traits in the abstract, rather than measuring the individual's ability to do the job. Requiring employers to justify a practice as job-related insures the criteria relate to one's ability to do the job. A showing that a practice is an RFOA would demonstrate that the criteria are not arbitrary, but fair and reasonable. Proof by the employer of a substantial business purpose for using the factor should establish that

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[15] The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (1991), amended Title VII to generally codify the job related and business necessity concepts of *Griggs v. Duke Power*, 401 U.S. 424, 436 (1971). *See* § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i).

the decision was "fair, proper, just, moderate, [or] suitable under the circumstances." BLACK'S, at 1138 (5th ed. 1979).

B. The Disparate Impact Method of Proof Insures that Employment Criteria are Job-Related.

The handful of disparate impact claims that have been fully litigated demonstrate that the theory provides a viable and feasible means for challenging age discrimination in neutral practices or justifying those practices as job-related and consistent with business necessity.[16] A close of examination of one case, *Smith v. City of Des Moines*, 998 F.3d 1466 (8th Cir. 1996), exemplifies how disparate impact theory actually operates in ADEA cases with the RFOA provision as a defense.

Smith challenged a new fitness requirement that all firefighters at the rank of captain or below had to pass a test determining whether they could safely fight fires while wearing a self-contained breathing apparatus ("SCBA"). A spirometry test measured the capacity of the lungs to exhale. If a firefighter failed the spirometry test, he or she had to pass a maximum stress test to measure the body's effective use of oxygen. 998 F.3d at 1468.

Having served 33 years as a firefighter with the Des Moines Fire Department, Smith had risen to the level of captain when the new fitness standard was implemented. After failing the tests the first year and then passing them the next three years, Smith failed the tests and was placed on sick leave. The city ultimately discharged Smith at age

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[16] *See, e.g., Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948 (8th Cir. 2001); *Allen v. Entergy Corp., Inc.*, 193 F.3d 1010 (8th Cir. 1999); *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999); *Smith v. City of Des Moines*, 998 F.3d 1466 (8th Cir. 1996).

55 for failing to meet the department's physical fitness standards. *Id.*

Smith filed suit under the ADEA, pursing both disparate treatment and disparate impact theories. The district court granted summary judgment to the city on both claims, finding the city had established a "business necessity" defense in response to the disparate impact claim. Smith's treatment claim failed because he was not qualified to perform the job. *Id.*

The Eighth Circuit assumed that Smith had demonstrated that the testing requirement had a disproportionate impact on older persons. *Id.* at 1470. The court then applied a defense "derived in part" from Title VII's disparate impact doctrine, relying on *Dothard v. Rawlinson*, 433 U.S. 321, 332 n. 14 (1977), and "in part from a provision of the ADEA which states that an employment practice is not unlawful 'where the differentiation is based on reasonable factors other than age.' 29 U.S.C. § 623(f)(1) (1994)." The court held that the city had the burden of persuasion to establish two elements: (1) "that the requirement has a manifest relationship to the employment in question," and (2) "is necessary to safe and efficient job performance." *Id.* at 1471.

The city demonstrated that the requirement was job-related by producing undisputed evidence that captains were frequently involved in fighting fires and wore SCBAs in such circumstances. As for the second element of the defense, the city produced evidence that it had relied on national standards on fitness testing for firefighters and had their own expert review relevant medical literature in setting the appropriate test measures. The court emphasized that "The city has not proceeded arbitrarily, but rather has carefully developed a standard based upon the available medical literature and using the best test available for measuring fitness, the stress test." *Id.* at 1473. In response to the city's showing, the court found

that Smith had failed to show that a proposed alternative would have a less discriminatory impact on older firefighters. *Id.*

Allowing Smith to challenge the physical fitness tests under a disparate impact theory insured that the city was not engaging in arbitrary age discrimination, without regard to the motive it had in mandating the requirement. Requiring Smith to proceed on a disparate treatment claim only would not subject job requirements to the scrutiny needed to insure that they test the individual for the job and not the person in the abstract. Rather, if older workers can show that a neutral practice disproportionately disadvantages them, that practice should be scrutinized under the objective standards of job-relatedness and business necessity.

CONCLUSION

For the foregoing reasons, *amici curiae* NELA and TLPJ urge the Court to reverse the judgment below and to hold that the ADEA permits disparate impact claims, with ADEA Section 4(f)(1) providing an affirmative defense to such claims.

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IN THE

Supreme Court of the United States

AZEL P. SMITH, *et al.*,
Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, AND POLICE DEPARTMENT OF THE CITY OF JACKSON, MISSISSIPPI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a disparate impact theory of liability is available under the Age Discrimination in Employment Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE ADEA DOES NOT PROVIDE FOR DISPARATE IMPACT LIABILITY	4
A. The ADEA's Text, Structure and Purpose Do Not Support Disparate Impact Claims	4
B. The EEOC's Interpretation Is Not Entitled To Deference	13
II. JUDICIAL CREATION OF AN ADEA DISPARATE IMPACT CLAIM WOULD SERIOUSLY UNDERMINE THE ABILITY OF STATE AND LOCAL GOVERNMENTS TO EFFECTIVELY MANAGE THEIR WORKFORCES	19
CONCLUSION	29

TABLE OF AUTHORITIES

Cases — Page

Adams v. Florida Power Corp., 535 U.S. 228 (2002) 18
Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 4, 13, 17
DiBiase v. Smithkline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) 6, 8, 12
District Council 37 v. New York City Dep't of Parks & Rec., 113 F.3d 347 (2d Cir. 1997) 25, 26
Duncan v. Walker, 533 U.S. 167 (2001) 6
EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994) 12
EEOC v. Governor Mifflin School Dist., 623 F.Supp. 734 (E.D. Pa. 1985) 24
EEOC v. Wyoming, 460 U.S. 226 (1983) 9, 12
Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996) 6
Geller v. Markham, 481 F.Supp. 835 (D. Conn. 1979), *aff'd*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) 21, 24
General Dynamics Land Systems, Inc. v. Cline, 124 S.Ct. 1236 (2004) 5
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) ... *passim*
International Bhd. Of Teamsters v. United States, 431 U.S. 324 (1977) 15, 23, 26
Laugesen v. Anaconda Corp., 510 F.2d 307 (6th Cir. 1975) 17
Leftwich v. Harris-Stowe State College, 540 F. Supp. 37 (E.D. Mo. 1982) 21-22, 22, 23
Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) 21, 22, 23, 24
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 13

TABLE OF AUTHORITIES—Continued

Page

MacPherson v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991) 24
Markham v. Geller, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) ..... *passim*
Markham v. Geller, 451 U.S. 945 (1981) 20, 21
Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974) 23
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 5
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 17, 20
Mete, et al., v. New York State Office of Mental Retardation & Dev. Disabilities, 984 F.Supp. 125 (N.D.N.Y. 1997) 26
Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) 12
Ohio Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989) 11
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 4, 13, 13-14
Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996) 27
United States v. Mead Corp., 533 U.S. 218 (2001) 13, 13-14
United States v. Naftalin, 441 U.S. 768 (1979) 8
Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) 9

Statutes and Regulations

Age Discrimination In Employment Act
29 U.S.C. § 623(a)(1) 9
§ 623(a)(2) ..... *passim*
§ 623(f)(1) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
29 C.F.R. 860.103(c) (1968)	14
29 C.F.R. 860.103(d) (1968)	14
29 C.F.R. 860.103(h) (1979)	20
29 C.F.R. 860.104(b) (1969)	15
29 C.F.R. 1625.7(d) (1981)	16, 24
Civil Rights Act of 1964, title VII, Pub. L. No. 80-352, 78 Stat. 253, codified as amended at 42 U.S.C. § 2000e-§ 2000e-17	
42 U.S.C. § 2000e-2	12
§ 2000e-2(a)(1)	5
Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, codified at 42 U.S.C. § 2000e-2(k)	6
Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 979, codified at 29 U.S.C. § 623(f)(2)	11
Other Authorities	
The American Heritage Dictionary Of The English Language (1981)	7
33 Fed. Reg. 9172 (Jun. 21, 1968)	14
33 Fed. Reg. 9173 (Jun. 21, 1968)	2, 14
34 Fed. Reg. 323 (Jan. 9, 1969)	15
44 Fed. Reg. 68858 (Nov. 30, 1979)	3, 16
44 Fed. Reg. 68858-62 (Nov. 30, 1979)	16
46 Fed. Reg. 47724 (Sept. 29, 1981)	15
46 Fed. Reg. 47724-28 (Sept. 29, 1981)	16
46 Fed. Reg. 47725 (Sept. 29, 1981)	3, 15, 16, 17
46 Fed. Reg. 47727 (Sept. 29, 1981)	16
Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982)	6, 8, 9

TABLE OF AUTHORITIES—Continued

	Page
Barbara Lindemann, *et al.*, *Employment Discrimination Law* (3d ed. 1996)	11, 28
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Donald R. Stacy, *A Case against Extending the Adverse Impact Doctrine to ADEA*, 10 Empl. Rel. L.J. 437 (1984)	16
U.S. Dep't of Labor, *The Older American Worker: Age Discrimination In Employment* (1965)	*passim*
Webster's New International Dictionary (2d ed. 1955)	7
Webster's Third New International Dictionary (1986)	7
Letter from W. Willard Wirtz, Secretary of Labor, to Hon. John H. McCormack, Speaker, U.S. House of Representatives, and Hon. Hubert H. Humphrey, Pres., U.S. Senate (Jan. 23, 1967)	10

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] As public employers, *amici* have an especially strong interest in legal issues that affect their ability to manage their workforces in a cost-effective manner.

Amici condemn invidious age-based discrimination against workers over the age of forty. Indeed, the States were at the forefront in banning arbitrary age-based discrimination. *See* U.S. Dep't of Labor, *The Older American Worker: Age Discrimination In Employment* 9 (1965). *Amici* thus fully recognize the need for remedies to address intentional age-based employment discrimination.

In contrast, the issue in this case—whether disparate impact claims are cognizable under the ADEA—raises the troubling prospect that public employers will be subject to liability because of necessary work practices which have been undertaken for reasons totally unrelated to age. As the court of appeals correctly recognized, the ADEA's text, structure and purpose do not support disparate impact liability.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

1. The text of ADEA section 4(a)(2) does not support disparate impact liability. Section 4(a)(2)'s prohibition against an employer's taking various employment actions

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[1] The parties have consented to the filing of this brief *amicus curiae* and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

"because of [an] individual's age," 29 U.S.C. § 623(a)(2), is most naturally read as prohibiting only intentional age-based discrimination. Indeed, the Court has expressly recognized that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

The Court has further explained that Congress enacted the ADEA "prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* As the Court has noted, an age-neutral employment practice does not present the problem of inaccurate and stigmatizing stereotypes even if the practice correlates with age. *See id.* at 611.

There is no merit to petitioners' contentions that it "is almost incomprehensible" to construe section 4(a)(2) as barring disparate impact liability "given the presence of precisely the same language in Title VII," or that to reject petitioners' reading of section 4(a)(2) is to "inescapably argu[e] that *Griggs* was wrongly decided." Pet. Br. 22 On the contrary, section 4(a)(2) must be construed in light of the ADEA's structure and purpose. Most significantly, the ADEA—unlike Title VII—expressly recognizes the authority of employers to differentiate between employees "based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). As several courts of appeals have recognized, this provision is antithetical to the notion that disparate impact claims are cognizable under the ADEA.

2. Nor is there any merit to petitioners' contentions that both the EEOC and DOL have consistently interpreted the ADEA as authorizing disparate impact liability. Contrary to petitioners' assertion, DOL's original rulemaking observed that "[t]he clear purpose" of the ADEA "is to insure that age . . . is not a determining factor" in making employment decisions. 33 Fed. Reg. 9173 (Jun. 21, 1968). When an

employer applies an age-neutral work rule, age is clearly not a determining factor even when a rule correlates with age.

Moreover, when the EEOC rewrote the regulation "to make it clear that" age-neutral practices could be challenged if they have a disparate impact, 46 Fed. Reg. 47725 (Sept. 29, 1981), the agency made no attempt to reconcile its rule with the ADEA's text, purpose, and the nature of age discrimination. Rather, the EEOC adopted disparate impact analysis because of its conclusion—on a matter of pure statutory construction—that the ADEA should "be interpreted in a manner which is consistent with Title VII." 44 Fed. Reg. 68858 (Nov. 30, 1979).

This legal conclusion is patently unreasonable. As Secretary Wirtz explained, "the easy thing to do would be simply to extend the conclusions derived from [the societal problems Title VII addresses] to the problem of discrimination in employment based on aging, and be done with the matter. *This would be easy—and wrong.*" *The Older American Worker, supra*, at 1 (emphasis added).

3. Many essential workforce practices have some correlation with age. For example, there are times when the fiscal constraints faced by public employers require layoffs or limit the funds available for pay and benefits. Even when public employers have responded to fiscal hardship by using age-neutral practices, they have been frequent targets of lawsuits brought by those within the ADEA's protected class. Relying on disparate impact analysis, some courts have imposed liability on public employers notwithstanding the lack of any probative evidence that the employer was motivated by age-bias or stereotypes. And even when public employers ultimately prevail on the merits, the litigation costs of defending these actions can erode the cost-savings that an employment policy or rule was intended to provide.

ARGUMENT

I. THE ADEA DOES NOT PROVIDE FOR DISPARATE IMPACT LIABILITY

The court of appeals correctly held that petitioners were not entitled to proceed with their ADEA disparate impact claim. As that court and four other courts of appeals have recognized, it is erroneous "to limit [the] construction calculus solely to the [textually similar] prohibitory sections of the ADEA and Title VII," Pet. App. 10a, and to assume that because such a claim is cognizable under Title VII, it must likewise be available under the ADEA.

As explained below, the text, structure and purpose of the ADEA make clear that Congress did not intend for there to be disparate impact liability under the ADEA. Petitioners' attempt to place the statute within the rules of *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), rests on implausible constructions of the ADEA's text and ignores the critical differences between the language and structure of Title VII and the ADEA. Petitioners' invocation of broad statements of congressional purpose ignores that Congress also chose means other than litigation to accomplish the ADEA's purposes. Finally, even if the statute could be plausibly deemed to be ambiguous, the EEOC's interpretation is not entitled to deference. The judgment of the court of appeals should be affirmed.

A. The ADEA's Text, Structure and Purpose Do Not Support Disparate Impact Claims

The text of section 4(a)(2) squarely refutes the notion that disparate impact claims are cognizable under the ADEA. Petitioners nonetheless contend that it "is almost incomprehensible" to construe section 4(a)(2) as barring disparate impact liability "given the presence of precisely the same

language in Title VII." Pet. Br. 22. The Court, however, in construing the ADEA has recognized that it is incorrect simply to adopt interpretations of Title VII without further analysis of "the text, structure, purpose, and history of the ADEA." *General Dynamics Land Systems, Inc. v. Cline*, 124 S.Ct. 1236, 1248 (2004). Indeed, simply to lift Title VII's interpretations wholesale and make them a part of the ADEA would ignore that the statutes have different purposes and reflect different legislative compromises between the interests of employers and employees.

For example, in construing Title VII's provision prohibiting race and other specified discrimination, *see* 42 U.S.C. § 2000e-2(a)(1), the Court has made clear that "[i]ts terms are not limited to discrimination against members of any particular race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976). Thus, in *McDonald*, the Court held that reverse discrimination claims are maintainable under Title VII. *See id.*

By contrast, in *General Dynamics v. Cline*, the Court declined to recognize reverse age discrimination claims. *See* 124 S.Ct. at 1239. Notwithstanding the close similarity between the language of ADEA § 4(a)(2) and 42 U.S.C. § 2000e-2(a)(1), the *Cline* Court expressly declined to adopt the *McDonald* rule applicable under Title VII. *See* 124 S.Ct. at 1243 n.5. Rather, the Court reached its holding based on a fresh examination of the text, structure, purpose and history of the ADEA. *See id.* at 1240-49.

Petitioners further contend that to reject their reading of section 4(a)(2) is to "inescapably argu[e] that *Griggs* was wrongly decided" and that "this case presents no circumstance that warrants reversing *Griggs*." Pet. Br. 22; *see also id.* at 11-13. Contrary to petitioners' view, taking a fresh look at the language of ADEA section 4(a)(2)—as well as the ADEA's structure and purpose—and concluding that they do not support disparate impact claims no more requires revers-

ing *Griggs* than the Court's recent decision in *General Dynamics* required reversing *McDonald*. Furthermore, whether *Griggs* can be said to have "expressly rel[ied]" on the text of Title VII in creating disparate impact liability, *see* Pet. Br. 22,[2] is beside the point in light of Congress' codification of disparate impact liability under Title VII. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074-75 (1991) (codified at 42 U.S.C. § 2000e-2(k)). Thus, concluding that the text of ADEA section 4(a)(2) does not support disparate impact liability will have no bearing on the continued availability of such claims under Title VII.[3]

1. The starting point in every case of statutory construction is the language of the statute. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 172 (2001). ADEA section 4(a)(2) states that

[2] Some courts have expressed a contrary view. *See Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 n.13 (10th Cir. 1996) ("*Griggs* did not base its holding on the text of Title VII, but rather looked primarily to the larger objectives underlying Congress' enactment of Title VII."); *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 734 (3d Cir. 1995) (opinion of Greenberg, J.) ("[W]hen the Supreme Court found disparate impact liability under Title VII, it relied not on any specific statutory language but on the policies behind the statute."). *See also* Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L.Rev. 837, 842 (1982) ("The disparate impact test of *Griggs* is a judicially developed doctrine that does not have its origins in the language of Title VII.") (footnote omitted).

[3] Invoking *Griggs*, petitioners urge that "[*s*]*tare decisis* is . . . decisive." Pet. Br. 22. This is a strange contention given that this Court has "never decided whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (citing *Markham v. Geller*, 451 U.S. 945 (1981)) (Rehnquist, J., dissenting from the denial of certiorari). *See also id.* at 618 (Kennedy, J., concurring) ("[W]e have not yet addressed the question whether . . . a disparate impact claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.") (citations omitted).

"[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]" 29 U.S.C. § 623(a)(2).

Petitioners provide no credible construction of the statutory text. Instead they offer only the conclusory assertion that "the phrase 'because of'—unlike such terms as 'willfully,' or 'purposefully,' or knowingly'—does not refer to an actor's state of mind in all (or even most) contexts, including in the ADEA. Rather, it refers to causation." Pet. Br. 22.

Petitioners' contention ignores the ordinary meaning of the phrase "because of." In common usage, the phrase means "[b]y reason of; on account of." *Webster's New International Dictionary* 242 (2d ed. 1955) (hereinafter *Webster's Second*). *See also Webster's Third New International Dictionary* 194 (1986) (same); *The American Heritage Dictionary Of The English Language* 117 (1981) (same). *Webster's* further defines "reason" as "[a] consideration, motive, or judgment inducing or confirming a belief, . . . or leading to an action or course of action; a rational ground or motive." *Webster's Second*, at 2074. *The American Heritage Dictionary* similarly defines "reason" as "[t]he basis or motive for an action, decision, or conviction." *Id.* at 1086.

Thus, contrary to petitioners' contention that "because of" "does not refer to an actor's state of mind in all (or even most) contexts," Pet. Br. 22, the most natural reading of the phrase "because of such individual's age" is, as the Court held in *Hazen Paper*, that the employee's age must be "the motivating factor" behind the employer's decision to discriminate. 507 U.S. at 611. Petitioner's construction of section 4(a)(2) as only requiring a showing of "but for" causation denies the statutory text its ordinary meaning.

Petitioners further assert that "a policy can 'adversely affect [an employee] because of such individual's age' even if that policy is not motivated by age." Pet. Br. 23 (citing 29 U.S.C. § 623(a)(2)). The punctuation of section 4(a)(2) makes clear, however, that the "because of" clause modifies the entire enumeration of employer practices and not just practices which "otherwise adversely affect" an employee's status. *See DiBiase*, 48 F.3d at 733 (opinion of Greenberg, J.). *See also* Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843 & n.27. Petitioners' proposed construction thus ignores the punctuation of the text as well as its ordinary meaning. *See United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979) ("[W]hile matters like punctuation [are] not decisive of the construction of a statute, where they reaffirm conclusions drawn from the words themselves they provide useful confirmation.") (internal quotation and citation omitted).[4]

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[4] Petitioners make several other arguments based on the grammatical structure of section 4(a)(2). First, they contend that "[h]ad Congress wished to restrict the ADEA to purposeful discrimination, it would more naturally have placed the words 'because of' far earlier in the provision, such that they would have described the *employer's* acts: 'It shall be unlawful for an employer, *because of an employee's age*, to limit, segregate, or classify * * *.'" Pet. Br. 23. Petitioners' suggestion, however, no more clearly expresses an intent that the ADEA be limited to purposeful discrimination than the wording and punctuation of the statute Congress enacted.

Petitioners further argue that because section 4(a)(2) describes the employer's conduct in the plural form and the "'because of' clause" uses the singular, it would be grammatically incorrect to read the "because of" clause as modifying (by imposing a purpose requirement) the types of prohibited employer conduct. *See* Pet. Br. 23-24. Petitioners ignore that while Congress used the plural term "employees" to describe employer actions that "limit, segregate, or classify employees," it then used the singular in proscribing only those employer practices that "deprive . . . any *individual* of employment opportunities." 29 U.S.C. § 623(a)(2) (emphasis added). Whether or not Congress achieved grammatical perfection, petitioners' contention that "the Fifth Circuit's decision requires reading the statute to render it unlawful for an employer 'to limit,

Indeed, their argument ignores that the punctuation and placement of the "because of" clause in section 4(a)(2) parallels the structure of section 4(a)(1), the ADEA's first prohibitory subsection, which does not contain the "adversely affect" language. *Compare* 29 U.S.C. § 623(a)(1) *with id.* § (a)(2). *See also* Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843.

In short, section 4(a)(2) cannot fairly be construed to authorize disparate impact claims. As the Court has unanimously explained, "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper*, 507 U.S. at 610. "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes" about age. *Id.* (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). "'[T]he available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.'" *Id.* at 611 (quoting *EEOC v. Wyoming*, 460 U.S. at 231). The ADEA accordingly "commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.'" *Id.* (quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985)).

The Court has further explained that "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." *Id.* at 611. Thus, in *Hazen Paper* the Court unanimously held that an adverse employment decision made to deprive an older worker of pension rights did not violate the ADEA, even though the employer

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segregate, or classify his *employees* * * * because of such *individual's* age," Pet. Br. 23-24, is simply sleight of hand.

was motivated by a factor that was clearly "correlated with age." *Id.*

An age-neutral employment practice does not present "the problem of inaccurate and stigmatizing stereotypes," *id.*, even if there is a demonstrable correlation between the practice and age. Consequently, to construe section 4(a)(2) to prohibit employment practices which are not motivated by an intent to discriminate but which have a disparate impact on persons over the age of 40 is irreconcilable with section 4(a)(2)'s text and purpose.[5]

2. Petitioners further argue that the ADEA's provision exempting employers from liability for a "differentiation . . . based on reasonable factors other than age," 29 U.S.C. § 623(f)(1), supports disparate impact claims. Pet. Br. 19. Contrary to petitioners' contention, the RFOA provision does

[5] In section 715 of Title VII, Congress directed the Secretary of Labor to "study . . . the factors which might tend to result in discrimination in employment because of age[,] . . . the consequences of such discrimination," and make recommendations for legislation. A portion of the Secretary's report discussed various "institutional arrangements that indirectly restrict the employment of older workers," some of which were age-neutral practices. U.S. Dep't of Labor, *The Older American Worker Age Discrimination In Employment* 15-17 (1965). While the Secretary recommended various measures such as reform of pension plans and changes to seniority arrangements, the report did not suggest that the creation of a cause of action to challenge age-neutral practices was necessary. *See id.* at 22.

Subsequently, the Secretary, in forwarding a draft bill of the ADEA, explained that "[t]he legislation also provides for attention to be given to institutional arrangements which work to the disadvantage of older workers, including those giving rise to involuntary retirement. Research would be undertaken and promoted with a view to reducing barriers to the employment of older workers." Letter from W. Willard Wirtz, Secretary of Labor, to Hon. John W. McCormack, Speaker, U.S. House of Representatives, and Hon. Hubert H. Humphrey, President, U.S. Senate 2 (Jan. 23, 1967) (hereinafter "Wirtz Letter"). The Secretary did not, however, recommend the creation of a disparate impact cause of action.

not "necessarily impl[y] that it is possible to violate section 4(a) . . . without having a discriminatory purpose." *Id.* at 19. Nor are petitioners correct in asserting that the requirement that the factor be reasonable "would be mere surplusage if no disparate impact claims were cognizable in the first place." *Id.*

It would be perverse to judicially impose a theory of liability which is not based on the express language of the ADEA's substantive prohibitions but rather is derived by an implication from a provision which is not even a "true affirmative defense[]." 1 Barbara Lindemann, *et al.*, *Employment Discrimination Law* 613 (3d ed. 1996).[6] Unlike the other provisions of section 4(f), the RFOA is more akin to a general denial by the employer "that age was a basis for the conduct under scrutiny." *Id.*[7] *See also Hazen Paper*, 507 U.S. at 611 ("[w]hen the employer's decision *is* wholly motivated

[6] As Secretary Wirtz explained in transmitting the draft legislation to Congress: "The legislation would clearly indicate that the prohibitions are designed to bar arbitrary age discrimination. Reasonable differentiations not based solely on age, including but not limited to bona fide occupation qualifications . . . would not fall with the proscription." Wirtz Letter, *supra*, at 1-2.

[7] The Court has explained that the parallel provision of "§ 4(f)(2) is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context. By requiring a showing of *actual intent* to discriminate in those aspects of the employment relationship protected by the provisions of the ADEA, § 4(f)(2) redefines the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act." *Ohio Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989) (emphasis added). While Congress subsequently enacted legislation providing that an employer (or labor organization) "shall have the burden of proving that . . . actions [taken pursuant to section 4(f)(2)] are lawful," *see* Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 978, 979 (codified at 29 U.S.C. § 623(f)(2)), no such language appears in section 4(f)(1). *See* 29 U.S.C. § 623(f)(1).

by factors other than age," the purposes of ADEA are not implicated). That Congress chose to make this clear by enacting the RFOA provision does not support petitioners' suggestion that disparate impact liability should implied from the provision. Moreover, in light of petitioners' repeated arguments based on the similarities between the ADEA and Title VII, *see* Pet. Br. 12-15, it bears emphasis that Title VII contains no language similar to the RFOA provision. *Compare* 42 U.S.C. § 2000e-2 *with* 29 U.S.C. § 623(f)(1).

The Court has explained that the RFOA provision was enacted "in order to insure that employers were permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33. As several courts of appeals have recognized, the provision is antithetical to the notion that disparate impact claims are cognizable. *See, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999) ("[I]f the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination.'"); *DiBiase*, 48 F.3d at 734 (opinion of Greenberg, J.) ("[B]y the statutory language itself, Congress recognized that neutral practices not motivated by discriminatory intent may be permissible employment practices."); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994) (RFOA provision "suggests that decisions which are made for reasons independent of age but which happen to correlate with age *are not actionable under the ADEA*") (emphasis added).

Rejecting the existence of disparate impact liability does not render the word "reasonable" (as petitioners contend) "mere surplusage." Pet. Br. 19. Quite the opposite, the provision is naturally understood as defining the parameters of a prima facie case of disparate treatment, when, as is often the case, there is no direct evidence of an employer's discriminatory intent. While the ADEA recognizes that employ-

ers may differentiate between employees based on a wide variety of legitimate factors, the requirement that a factor be "reasonable" guards against an employer's pretextual use of a factor other than age to engage in age-based discrimination. *See, e.g., Hazen Paper*, 507 U.S. at 613; *see also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) ("The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one."). Thus, the word "reasonable" is not surplusage and its presence in section 623(f)(1) does not support judicial implication of disparate impact liability.

B. The EEOC's Interpretation Is Not Entitled To Deference

As explained above, the ADEA's text, structure and purpose make clear that Congress did not authorize disparate impact claims under the statute. That should be "the end of the matter" as "the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Nonetheless, even if this Court were to conclude that the ADEA is ambiguous, the EEOC's regulation is not entitled to deference under either *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Court has stated that "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (footnotes and citations omitted). As the Court explained in *Skidmore*, "The weight [accorded to an administrative] judgment in a particular case will depend

upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140 (quoted in *Mead*, 533 U.S. at 228). As explained below, the EEOC's disparate impact regulation does not meet these standards.

First, petitioners misstate the extent to which the EEOC and DOL (which was originally vested with power to enforce the act) have interpreted the ADEA to authorize disparate impact liability. Indeed, the original rule—which was not subjected to the APA's notice and comment provisions—suggested that nothing more than pretextual disparate treatment claims were cognizable. *See* 33 Fed. Reg. 9172 (Jun. 21, 1968). DOL explained that "it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job." *Id.* at 9173 (quoting 29 C.F.R. 860.103(c) (1968)). DOL further observed that "[t]he clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual." *Id.* As explained above, *see supra* at 10, when an employer applies age-neutral work rules, age is clearly "not a determining factor" even when a rule correlates with age. *Id.*; *see also Hazen Paper*, 507 U.S. at 611.

Most significantly, DOL's regulation further stated that "[t]he reasonableness of a differentiation will be determined on *an individual, case by case basis, not on the basis of any general or class concept*, with unusual working conditions given weight according to their individual merit." *Id.* (quoting 29 C.F.R. 860.103(d) (1968)) (emphasis added). This regulation is irreconcilable with disparate impact liability. One of

the critical premises underlying disparate impact liability is that a large statistical imbalance between classes supports an inference of discrimination. *See, e.g.*, Barbara T. Lindemann & David D. Kadue, *Age Discrimination in Employment Law* 414 (2003); *International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 339 & n.20 (1977). The other is that the classes being compared are large enough to create statistical significance. *See Age Discrimination in Employment Law*, *supra*, at 414; *Teamsters*, 431 U.S. at 339 n. 20. DOL's original determination rejecting the use of the "class concept" refutes petitioners' assertion that DOL and EEOC have consistently interpreted the ADEA as recognizing disparate impact liability.

While DOL's RFOA rule required that an employer establish the validity of some age-neutral practices (such as physical fitness and physical examination requirements), at most this supports the recognition of pretextual disparate treatment claims and not class-based disparate impact liability. This is made clear by DOL's 1969 amendment to the RFOA rule, which stated that "situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute." 34 Fed. Reg. 323 (Jan. 9, 1969) (codified at 29 C.F.R. 860.104(b) (1969)).

The assertion that DOL and EEOC have consistently interpreted the ADEA to provide for disparate impact liability is also refuted by the EEOC's 1981 rulemaking. There, the EEOC explained that it had *rewritten* the RFOA regulation "to *make it clear* that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity." 46 Fed. Reg. 47724, 47725 (Sept. 29, 1981) (citing *Griggs*) (emphasis added). Notwithstanding the EEOC's assertion, the 1981 regulation

was in fact the first time a federal rule provided that an employment practice could be challenged if "such a practice has an adverse impact on individuals within the protected age group." *Id.* at 47727 (codified at 29 C.F.R. 1625.7(d)).

Beyond the inconsistency between the DOL and EEOC rules, there are several other reasons for not deferring to the EEOC's regulation. Petitioners make much of the fact that EEOC conducted a notice and comment rulemaking and "made changes to the regulation in response to public comment." Pet. Br. 30 (internal quotations and citation omitted). The EEOC made no attempt, however, to reconcile its interpretation with the ADEA's text, purpose and the nature of age discrimination. Indeed, not once did the EEOC even discuss whether the substantive prohibitions of section 4(a)(1) & (2) encompass non-pretextual age-neutral practices. *See generally* 44 Fed. Reg. 68858-62 (Nov. 30, 1979); 46 Fed. Reg. 47724-28 (Sept. 29, 1981). Rather, it is apparent that the EEOC simply adopted disparate impact analysis because of its conclusion—on a matter of pure statutory construction—that the ADEA should, in the agency's words, "be interpreted in a manner which is consistent with Title VII." 44 Fed. Reg. 68858 (Nov. 30, 1979). *See also* 46 Fed. Reg. 47725 (Sept. 29, 1981) (citing *Griggs*).[8]

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[8]That the EEOC simply imposed its legal interpretation without any independent reasoning as to the ADEA's text and purpose is further manifested by its re-writing of the RFOA regulation to impose on employers the requirement that an age-neutral practice which has a disparate impact "must be justified as a business necessity." 46 Fed. Reg. 47725 (Sept. 29, 1981); *see also id.* at 47727 (29 C.F.R. 1625.7(d)). This standard finds no support in the text of the ADEA's RFOA provision. *See* 29 U.S.C. § 623(f)(1); Donald R. Stacy, *A Case against Extending the Adverse Impact Doctrine to ADEA*, 10 Empl. Rel. L.J. 437, 448 (1984) ("[T]he regulation is in conflict with the statute it seeks to interpret in its extension of the business necessity test."). Because the regulation plainly conflicts with the language of the statute it is not entitled to deference. *See Chevron*, 467 U.S. at 843.

In support of its disparate impact rule, the EEOC also cited *Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975). *See* 46 Fed. Reg. at 47725. While *Laugesen* involved an ADEA claim, it was a disparate treatment case. *See* 510 F.2d at 311-13 (discussing applicability of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Most remarkably, the Sixth Circuit expressly stated in *Laugesen* that "it would be inappropriate simply to borrow and apply [the *McDonnell Douglas* standard] automatically." *Id.* at 312. As the Sixth Circuit reasoned, "[t]hat [Title VII] is embodied in a separate act and has its own unique history at least counsels the examiner to consider the particular problems sought to be reached by the statute." *Id. See also id.* ("[W]hile the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age.").

It is inappropriate to defer to the EEOC's interpretation of the ADEA because it is not based on any independent reasoning or expert analysis of the problem of age discrimination but rather is based on this Court's construction of a statute which addresses the different problems of race, religion and gender-based discrimination. Indeed, as Secretary Wirtz explained, it is patently unreasonable to do so:

> The Nation has faced the fact—rejecting inherited prejudice or contrary conviction—that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. *This would be easy—and wrong.*

U.S. Dep't of Labor, *The Older American Worker: Age Discrimination In Employment* 1 (1965) (emphasis added).

As the Secretary's report made clear, "'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example —race." *Id.* at 2. Indeed, the fundamental premise underlying *Griggs*—that widespread and persistent societal discrimination had resulted in "'built-in headwinds'" which prevented members of minority groups from obtaining employment, 401 U.S. at 432—does not exist with respect to age discrimination.

As the Secretary explained: "Employment discrimination because of race is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned." *The Older American Worker*, *supra*, at 2. Rather, the ADEA was targeted at employer practices which use age as a criterion for denying employment opportunity "because of assumptions about the effect of age on [an employee's] ability to do a job *when there is in fact no basis for these assumptions*." *Id.*; *see also Hazen Paper*, 507 U.S. at 610-11.

The ADEA accordingly strikes a different balance between the interests of employees and employers than does Title VII. The EEOC's imposition of ADEA disparate impact liability because it is available under Title VII–a position which the agency has not defended in briefing in this Court in either this case or *Adams v. Florida Power Corp.*[9]—is manifestly unreasonable. Its regulation is not entitled to deference under either *Chevron* or *Skidmore*.

[9] *Writ dismissed as improvidently granted*, 535 U.S. 228 (2002).

(202)**JUDICIAL CREATION OF AN ADEA DISPARATE IMPACT CLAIM WOULD SERIOUSLY UNDERMINE THE ABILITY OF STATE AND LOCAL GOVERNMENTS TO EFFECTIVELY MANAGE THEIR WORKFORCES**

As explained above, neither the text, structure, purpose nor legislative history of the ADEA establish that Congress intended to create a cause of action to challenge age-neutral practices because they may have a disparate impact on employees within the protected class. Many essential workforce practices have some correlation with age. As explained below, judicial sanctioning of disparate impact ADEA claims has unduly restricted the ability of governmental employers to manage their workforces and provide cost-effective public services. Moreover, even when a governmental em-ployer ultimately prevails in a disparate impact suit, the litigation costs of defending an age-neutral employment practice may well exceed the cost-savings that the practice was meant to provide.

For example, in *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), a school board had adopted a cost-cutting policy of generally recruiting new teachers with no more than five years experience. At trial, the plaintiff introduced statistical evidence showing "that 92.6% of Connecticut teachers between 40 and 65 years old . . . have more than 5 years experience, while only 62% of teachers under 40 have taught more than five years." 635 F.2d at 1030. The district court relied on *Griggs* to hold that the "policy was discriminatory as a matter of law," and rejected the school board's contention that the ADEA required proof of a discriminatory motive. *Id.*

The Second Circuit affirmed. The court acknowledged that "the significance of the 92.6% figure is somewhat weakened by evidence that over 60% of teachers under 40 also have had

more than five years experience." *Id.* at 1032-33. It nonetheless "agree[d] with [the district court's] finding that the high correlation between experience and membership in the protected age group. . . . would render application of the [school board's] policy discriminatory as a matter of law, since, absent countervailing statistics, the likelihood of a person over 40 being selected under the policy would be substantially less than that of a person under 40." *Id.* at 1033 (citation omitted). According to the court, "[*t*]*he purpose of the . . . policy was to economize by employing less experienced teachers*, which would inevitably open more teaching opportunities to younger less experienced applicants than to the older, who were more experienced." *Id.* at 1033 (emphasis added).

The court then rejected the school board's contention that the policy was justified by the need to cut costs due to budgetary pressures. *See id.* at 1034. Relying on a Department of Labor regulation which prohibited the classification of employees "'solely on the basis of age for the purpose of comparing costs,'" *id.* (quoting 29 C.F.R. 860.103(h) (1979)), the court ruled that "[t]his cost justification must fail." *Id.* The court did so notwithstanding that the school board's policy made "no reference to age and . . . in practice has had a significant impact on teachers under the age of 40 as well as those over that age." 451 U.S. 945, 948 (Rehnquist., J., dissenting from denial of certiorari). According to the court of appeals, "Ms. Geller established disparate impact by proving that she was subjected to a facially neutral policy disproportionately disadvantaging her as a member of a protected class." 635 F.2d at 1034 (citing *inter alia Griggs*).[10]

[10] The court of appeals also held that Ms. Geller had "established a prima facie case of discriminatory treatment under *McDonnell Douglas Co. v. Green*, 411 U.S. 792 (1973)." 635 F.2d at 1034. It is clear, however, that the case was not tried under this theory and the district court did not instruct the jury on the elements of a disparate treatment claim. *See Geller v. Markham*, 481 F.Supp. 835, 839 (D.Conn. 1979) (rejecting defendants' motion for new trial) (Geller "does not challenge the motive of those who made the individualized decision to hire her. . . . Ms. Geller falls squarely within the Griggs line of authority, and the McDonnell Douglas notions of motive are inapplicable."). *See also* 635 F.2d at 1034 n.3 ("the trial court failed to instruct the jury on the specific elements of a *McDonnell Douglas* prima facie case").

As then-Justice Rehnquist explained, the Second Circuit's holding "manages to tie the hands of local school boards in dealing with ever-increasing costs without the sanction of the Act which Congress passed to protect older workers." 451 U.S. at 948. The court's "rationale would similarly prohibit the Board from deciding no longer to give full credit for teaching experience received at other school districts." *Id.*

Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983), is another example of the use of adverse impact analysis to prevent public employers from taking necessary action to control costs. In *Leftwich*, the Missouri legislature transferred control of a college from the St. Louis Board of Education to the state college system. *Id.* at 689. The college, however, had much higher faculty costs than other institutions in the state college system. Its board of regents therefore adopted a plan to reduce the number of full-time faculty members by a third (from 51 to 34) and "to reserve certain positions on the . . . faculty for nontenured staff." *Id.* at 690.

Following the transfer, the regents invited the faculty to apply for positions at the state college. Leftwich, a biology professor, was not rehired when the number of biology faculty was reduced from three to two–one tenured and one non-tenured. *Id.* at 689. Leftwich then sued under the ADEA on the ground that "[b]y reserving non-tenured positions, [the regents] adversely affect older teachers since a larger share of non-tenured teachers than tenured teachers are under forty

years of age." *Leftwich v. Harris-Stowe State College*, 540 F.Supp. 37, 41 (E.D.Mo. 1982).

Leftwich's expert testified "that the mean age of the tenured faculty at the 'old' city college was 45.8 years, while the mean age of nontenured faculty was 34.3 years" and that the "mean annual salary at the 'old' city college for tenured faculty was $ 17,900 compared to $ 13,025 for nontenured faculty." 702 F.2d at 690. Based on the meager evidence provided by such a small statistical base, the district court found for Leftwich, holding that he had "established a prima facie case of discriminatory impact" and that the regents' contention that it was "necessary to reserve certain positions for non-tenured teachers in order to cut expenses" was "not a valid business excuse to defend a prima facie case of disparate impact." 540 F.Supp. at 41-42.

The court of appeals affirmed. According to the court, Leftwich's statistical evidence established that the board's policy had a disparate impact on older faculty members. *See* 702 F.2d at 690-91. Moreover, the plan's purpose of reducing faculty costs "did not establish a business necessity defense." *Id.* at 691. While acknowledging that the "plan was based on tenure status rather than explicitly on age," the court reasoned that "because of the close relationship between tenure status and age, the plain intent and effect of the . . . practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts." *Id.* According to the court, "[i]f the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated." *Id.*

While the court of appeals discussed the mean age of the tenured and non-tenured faculty prior to the re-organization, neither it nor the district court indicated the mean age of the new tenured and non-tenured faculty. Moreover, neither the court of appeals nor the district court examined the tenure

status and ages of the faculty who were not rehired, a telling omission as the purpose of disparate impact analysis is to determine the effect of the employer's policy on a protected group. Furthermore, given that at most 16 faculty members were terminated, *see* 702 F.2d at 689, the population was not large enough to produce a statistically significant inference of age discrimination. *See, e.g., International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977) ("Considerations such as small sample size may . . . detract from the value of [statistical] evidence."); *cf. Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 621 (1974) ("[T]he District Court's concern for the smallness of the sample presented by the 13-member Panel was. . . well founded.").

Finally, in *Leftwich* the court of appeals affirmed the district court's order reinstating the plaintiff to a tenured faculty position in the biology department. *See* 702 F.2d at 693. The regents, however, had previously determined that only two biology faculty were necessary, a decision which presumably was also based in part on course demand. *See* 540 F.Supp. at 40. The federal courts' disregard of the college's justification for its hiring plan typifies the undue intrusion on the core management prerogatives of public employers which results from the filing of ADEA disparate impact claims. Such judicial scrutiny of essential personnel practices falls outside the ADEA's purpose of reducing arbitrary age-based employment decisions "on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper*, 507 U.S. at 610.

Many necessary employment rules and policies have some correlation with age. To be sure, governmental employers may ultimately prevail on disparate impact claims. But because the threshold to state a prima facie case of disparate

impact is easily met, in many instances even weak cases can only be resolved after extensive discovery and/or trial.[11]

This point is demonstrated by a case similar to petitioners' suit, in which the plaintiffs brought a disparate impact claim alleging that a state university had a "practice of paying market rates of salary to new faculty hires, but not paying the market rate to incumbent professors." *MacPherson v. University of Montevallo*, 922 F.2d 766, 770 (11th Cir. 1991). The plaintiffs claimed that this practice had "a disparate impact on older people because they tend to be the faculty members who have been at the University the longest." *Id.* at 770-71. They did so notwithstanding that the university had provided salary adjustments for market-based reasons to professors whose fields were in great demand and had previously provided both plaintiffs with adjustments. *See id.* at 772. The case nonetheless went to trial, during which the court granted the university's motion for a directed verdict at the close of the plaintiffs' case on the ground that the university had shown "a legitimate business justification for its practice of paying new hires at market rates" and the plaintiffs had failed to prove "the existence of an equally effective, financially feasible, alternative practice." *See id.* at 773.[12]

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[11] As explained above, both the EEOC and several courts have read the "reasonable factors other than age" language in a manner which renders it merely duplicative of the more stringent "business necessity" test. *See* discussion *supra* at 16-17 n.8 (discussing 29 C.F.R. § 1625.7(d)). *See also Leftwich*, 702 F.2d at 692 ("defendants have failed to meet their burden of demonstrating that their discriminatory selection plan was justified by business necessity"); *Geller*, 481 F.Supp. at 839 ("a showing of disparate impact shifts the burden to the defendants to establish the 'job-relatedness' of their tests or the 'business necessity' behind their policies").

[12] *See also EEOC v. Governor Mifflin School Dist.*, 623 F.Supp. 734 (E.D. Pa. 1985) (EEOC brought disparate impact suit challenging terms of collective bargaining agreement which reduced number of salary steps

Similarly, in *District Council 37 v. New York City Dep't of Parks & Rec.*, 113 F.3d 347 (2d Cir. 1997), the City ultimately won a jury verdict in a disparate impact suit challenging large layoffs that were necessitated by deep budget cuts. In response to a severe fiscal crisis, the City had cut the Park Department's budget from $ 176 million to $ 108 million. *See id.* at 348. Because labor costs were such a large part of the Parks' budget, the Department ultimately laid off "1,585 of its 5,180 employees." *Id.* at 349. While the Department eliminated positions across numerous job □lassifycations, it entirely eliminated the position of "laborer," which then included 187 employees. *See id.* at 349 n.1. The average age of the laborers was 57, and every laborer was over the age of 40. *See id.* However, all the laborers did not lose their jobs. *See id.*; *id.* at 354. Some laborers invoked their seniority to bump workers in other classifications. *See id.* at 349 n.1.

Before the layoffs, 48 percent of the Department's workforce was 40 or older. *See id.* Moreover, "only 40 percent of those laid off were age 40 or older." *Id.* (footnote omitted). Thus, employees over the age of 40 were actually underrepresented in the layoffs, and the workforce in fact became older. The former laborers nonetheless sued the Department on the ground that the layoffs had a disparate impact on employees over the age of 40. *See id.* at 349.

At trial, plaintiffs called an expert witness who had conducted computer simulations of random layoffs. Plaintiffs' expert asserted that if the Department had randomly selected which job categories to cut and how extensive to cut and then applied the seniority rules, only 32 percent of the laid-off workers would have been age 40 or over. *See id.* at 350. This

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and thereby resulted in the most senior employees getting smaller raises than less senior employees even though the senior employees remained the highest compensated; court granted summary judgment to school district).

was deemed to constitute a prima facie case of disparate impact age discrimination notwithstanding that "those age 40 and older were underrepresented" in the layoffs. *Id.* Moreover, the Department's decision to eliminate the classification of laborer was not dispositive as to whether an employee was ultimately laid off because an employee might invoke seniority rights and retain employment as some did. *See id.*

Although the jury returned a verdict for the City and the court of appeals affirmed, the case nonetheless demonstrates the problematic nature of applying ADEA disparate impact analysis to the personnel practices of public employers. While the plaintiff's statistical evidence was not even remotely probative of arbitrary age-based discrimination, a trial was nonetheless required to resolve the claim.[13] Indeed, the litigation of these claims will typically be extremely costly given the complexity of the discovery and statistical proof involving dueling expert witnesses.[14]

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[13] *See also Mete, et al., v. New York State Office of Mental Retardation & Dev. Disabilities*, 984 F. Supp. 125, 144 (N.D.N.Y. 1997) (rejecting state employer's summary judgment motion where State "maintain[ed] that . . . RIF was necessitated by the budgetary crisis and that the statistical disparity is explained by the fact that the [laid off employees] are all management level. . . . [T]here are genuine issues of material fact with respect to the trustworthiness of defendants' business justification that precludes [*sic*] summary judgment[.]").

[14] Also troubling was the district court's allowing the case to go to trial on the basis of a comparison of the ages of the laid-off laborers to a computer simulation predicting the average age of random layoffs rather than a comparison of the age of the laid-off workers to the age of the work force. Statistics "come in infinite variety. . . . [T]heir usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340. The comparison to random layoffs is unwarranted as few public employers would engage in random layoffs when confronted with the need to significantly restructure an agency for fiscal reasons. Rather, agency heads would evaluate the structure of their workforces and determine which positions are essential and target those that are not for layoffs.

Sanctioning ADEA disparate impact liability would also likely result in other claims that are costly to litigate but which do not implicate the statute's purpose of preventing intentional age-based discrimination. Indeed, because declining physical condition is part of the aging process, it is reasonable to expect extensive litigation challenging job-based physical requirements. *See, e.g., Smith v. City of Des Moines*, 99 F.3d 1466, 1468 (8th Cir. 1996). In *Smith*, a fire captain failed the physical standards as determined by spirometry (lung capacity) and stress (VO2 max) tests necessary to wear a self-contained breathing apparatus (SCBA) while fighting fires. *See id.* at 1468, 1471. The city offered to place the fire captain on sick leave for several months until he became eligible for retirement. *See id.* at 1468. The captain did not, however, apply for retirement. *See id.* The city later offered the captain a leave of absence with benefits to enable him to retire with a full pension. *See id.* The captain again did not file for retirement. *See id.* The city then discharged the captain for failing to meet the physical requirements. *See id.*

Thereafter, the captain sued under the ADEA alleging that the City's physical standards had "a disparate impact on older firefighters." *Id.* While the district court granted summary judgment for the city on the ground that its SCBA standards met the business necessity test,[15] the court of appeals affirmed

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Furthermore, public employers are frequently subject to the constraints imposed by collectively-bargained agreements. While these agreements may significantly limit a public employer's ability to lay off employees holding certain positions, more senior supervisory positions are typically not covered by the agreement. Faced with a fiscal crisis, a public employer may have no choice but to layoff employees who are predominately within the ADEA's protected class.

[15] The City's spirometry rule was based on the standard developed by the American National Standards Institute (ANSI). *See* 99 F.3d at 1471. The City's VO2 max rule was based on a review of medical literature, which included a study that determined that only 40% of firefighters with

in a split decision, with the dissenting judge contending that the city had failed to "validate its fitness test for job-relatedness to the particular skills and exertional requirements of a fire captain." *Id.* at 1475. The dissent also reasoned that "there is conflicting evidence in the record as to whether the test used and the specific fitness level set by the city are reasonable." *Id.*

The dispute between the panel members in *Smith* is inevitable in disparate impact cases. As a leading authority explains, "[t]hough the key terms ['business necessity' and 'job related'] have been used since *Griggs*, their meaning remains unclear." Barbara Lindemann *et al.*, I *Employment Discrimination Law* 106 (3d ed. 1996). It is plausible to believe that some courts would find, as the dissenting judge in *Smith* did, that the employer's physical standards were unreasonable and not justified by the requirements of the job. *See id.* at 1475. Yet there are a variety of factors that may significantly affect an employee's performance on a physical standards test and which are within the control of the employee, such as whether the employee smokes and whether the employee maintains his physical condition and weight. Allowing adverse impact claims under the ADEA would frequently allow employees to avoid personal responsibility by challenging the standard as having a disparate impact on those over the age of forty.

As the foregoing cases demonstrate, authorizing ADEA adverse impact claims would subject many essential public employer personnel policies to judicial second-guessing even when those practices are not remotely indicative of arbitrary discrimination against workers over the age of 40. While public employers may ultimately prevail in these cases, the costs of doing so are great and can have a profound effect on

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a VO2 max less than the City's standard were able to complete necessary firefighting tasks in a simulation. *See id.* at 1471-72.

the ability of a governmental unit to provide essential services. Because the ADEA's text, structure and purpose make clear that a plaintiff must show discriminatory intent on the part of a public employer to establish a violation of the act, the Court should reject petitioners' entreaty to imply a disparate impact cause of action under the statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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In the

Supreme Court of the United States

ADEL P. SMITH, et al.,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CONGRESS DID NOT INTEND TO CREATE DISPARATE IMPACT LIABILITY UNDER THE ADEA 3

A. The Plain Wording of ADEA Encompasses Only Disparate Treatment 3

B. Disparate Impact Liability Was Developed to Combat Intentional Discrimination; Mere Statistical Disparity Does Not Constitute Discrimination 5

C. The Sole Rationale for Disparate Impact Is Preventing Pretexts for Discrimination 8

II. THE COURTS AND ADMINISTRATIVE AGENCIES, NOT CONGRESS, HAVE EXTENDED DISPARATE IMPACT ANALYSIS TO OTHER LAWS 11

A. Administrative Agencies Have Sought to Expand the Scope of Disparate Impact Analysis to Other Laws 11

B. Congress Has Limited Disparate Impact Liability 12

III. RECOGNIZING THE FLAWS OF DISPARATE IMPACT, THIS COURT HAS LIMITED ITS APPLICATION 14

IV. SOUND PUBLIC POLICY REASONS REJECT EXPANSION OF DISPARATE IMPACT LIABILITY TO THE ADEA 17

A. Disparate Impact Liability Is Based on Unauthorized Administrative Regulations 17

B. Disparate Impact Liability Raises the Specter of Quotas 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

Adams v. Florida Power Corporation, 535 U.S. 228 (2002) 1

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 9

Alexander v. Sandoval, 532 U.S. 275 (2001) 12, 19-20

Connecticut v. Teal, 457 U.S. 440 (1982) 10

County of Washington v. Gunther, 452 U.S. 161 (1981) 7

Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999) 1

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 17

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 5-7, 9

Hazen Paper Company v. Biggins, 507 U.S. 604 (1993) 3-5

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 13

Lau v. Nichols, 414 U.S. 563 (1974) 11-12

Lewis v. Casey, 518 U.S. 343 (1996) 15-17

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 8

New York Transit Authority v. Beazer, 440 U.S. 568 (1979) 9

TABLE OF AUTHORITIES—Continued

Page

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 15

Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003) 2

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 18-19

Village of Arlington Heights v. Metro Housing Development Corp.,429 U.S. 252 (1977) 14-15

Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989) 8-9

Washington v. Davis, 426 U.S. 229 (1976) 14-16

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) 10, 20-21

Federal Statutes

29 U.S.C. § 206(d)(1) 7

29 U.S.C. § 621 et seq. 2-3

§ 621(f)(1) 7

§ 623 3

33 U.S.C. § 1344(a) 19

42 U.S.C. § 1981 13

§ 2000d et seq 11

§ 2000e 6

§ 2000e-2 12

TABLE OF AUTHORITIES—Continued

Page

§ 2000e-2(*l*) 13

§ 2000e-5 13

92 Stat. 3781 18

Pub. L. No. 102-166, 105 Stat. 1071 12

Federal Regulations

3 C.F.R. § 321 (1979) 18

29 C.F.R. § 1625.7 (1981) 17

43 Fed. Reg. 19807 (1979) 18

Legislative Material

110 Cong. Rec. 7212 (1964) 6

Miscellaneous

Herbert, Douglas C. and Shelton, Lani Schweiker, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. Tex. L. Rev. 625 (1996) 18

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Respondent City of Jackson. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF considers this case to be significant in that it concerns the scope of disparate impact, a doctrine that is often counterproductive to the public interest. PLF has filed amicus briefs addressing the inequities of disparate impact analysis in *Adams v. Florida Power Corporation*, 535 U.S. 228 (2002), and *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999).

STATEMENT OF THE CASE

This Court granted certiorari to determine the following question.

Whether disparate impact claims are cognizable under the Age Discrimination in Employment Act?

The facts of this case are simply stated. In order to bring starting salaries up to the regional average, the City of Jackson adopted a pay plan that granted proportionately larger pay increases to police officers with less than five years tenure. Thirty officers and dispatchers, all over the age of forty, sued

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[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

the City alleging that it had discriminated against them because of their age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, et seq. The United States District Court for the District of Mississippi granted summary judgment to the City. *Smith v. City of Jackson*, 351 F.3d 183, 185 (5th Cir. 2003). On appeal, the Fifth Circuit affirmed that the ADEA was not intended to remedy age disparate effects that arise from employment policies that are not based on age. *Id.* at 187. This Court granted certiorari.

SUMMARY OF ARGUMENT

The wording of the ADEA shows Congress intended to address only intentional discrimination on the basis of age and not policies or acts that merely have a disparate impact. This Court developed disparate impact analysis to combat the vestiges of intentional discrimination and not mere statistical disparities.

It has been administrative agencies and the courts that created disparate impact liability. Congress has only sought to limits its application. This Court has also sought to limit disparate impact liability by requiring proof of intentional discrimination in Equal Protection Clause cases.

Public policy considerations counsel against any expansion of disparate impact analysis. Disparate impact liability in the ADEA is based on administrative regulations that contravene the intent of Congress. Requiring proportional impact leads to implementation of quota systems that are the antithesis of congressional policy in enacting the ADEA. The decision below should be affirmed.

ARGUMENT

I

CONGRESS DID NOT INTEND TO CREATE DISPARATE IMPACT LIABILITY UNDER THE ADEA

A. The Plain Wording of ADEA Encompasses Only Disparate Treatment

The ADEA, 29 U.S.C. § 621, et seq., provides in pertinent part:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .
>
> . . . .
>
> (f) It shall not be unlawful for an employer . . . .
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . . .

29 U.S.C. § 623.

The issue is whether this language imposes disparate impact liability. This Court noted in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that it has long "distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination." *Id.* at 609.

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.
>
> Claims that stress disparate impact [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory.

Id. (internal quotation marks omitted).

The language of the ADEA makes clear that the disparate treatment theory is available under the ADEA. *Id.* "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Id.* at 610. As this Court explained:

> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.

Id.

While this Court specifically stated that it was not deciding whether a disparate impact theory of liability is available under the ADEA, *id.* at 610, its language in *Hazen*

Paper strongly suggests that the answer is no. This Court declared:

> Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

Id. at 611 (citation omitted).

The Court explained: "When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* The essence of the disparate impact theory is the correlation of a facially neutral factor with the protected status. Thus, the mere fact that conduct motivated wholly by factors other than age falls more heavily on the protected age group does not give rise to an ADEA violation. As this Court explained, ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore." *Id.* at 612.

B. Disparate Impact Liability Was Developed to Combat Intentional Discrimination; Mere Statistical Disparity Does Not Constitute Discrimination

The doctrine of "disparate impact" saw its initial application in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There, this Court ruled that an employer's requirement that job applicants have completed high school and pass a general intelligence test discriminated against blacks in violation of

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin),[2] because it excluded a higher proportion of blacks than whites and was not demonstrably related to actual ability to do the work. *Griggs,* 401 U.S. at 431-32. The ruling in *Griggs* was clearly influenced by the fact that the employer had a history of overt racial discrimination which had apparently ceased after the enactment of the Civil Rights Act of 1964, although the employer continued to follow policies that had a markedly disproportionate effect on blacks. *Id.* at 428-29. The actuality of intentional discrimination was shown by the fact that Duke Power adopted the new requirements on the day that Title VII went into effect and specified that it would not apply to white employees already hired. *Id.* at 427. These facts suggest the employer was using facially neutral criteria as a proxy for racial discrimination.

Griggs created the following standard: "The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . . If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

Although *Griggs* expanded the reach of Title VII to include disparate impact, it attempted to limit the measure's scope:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31.

The scope of the ADEA is even more limited. Section 4(f)(1), 29 U.S.C. § 621(f)(1), permits an employer to take any action otherwise prohibited under the ADEA "where the differentiation is based on reasonable factors other than age." *Id.* There is no similar provision in Title VII. However, a similar provision in the Equal Pay Act, 29 U.S.C. § 206(d)(1), exempts pay differentials "based on any other factor other than sex." In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court found that this language was inconsistent with disparate impact liability and indicated the intent of Congress to limit Equal Pay claims to disparate treatment. *Id.* at 170. The "reasonable factors other than age" proviso in the

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[2] As pointed out in Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 844 (1982) (Krop), the legislative history of Title VII indicates that Congress did not originally intend to authorize disparate impact claims, citing the interpretive memorandum by its floor managers, Senators Clark and Case, in the Congressional Record. That memorandum specifies that the Act only prohibits practices by which an employer segregates or classifies employees "on the basis of" race, religion, sex or national origin. 110 Cong. Rec. 7212 (1964). Krop reasons that if Congress did not intend Title VII to encompass disparate impact claims, it similarly did not intend to include them in the ADEA. 34 Stan. L. Rev. at 844.

ADEA similarly evidences congressional intent to limit the ADEA to disparate treatment claims.

This fact is buttressed by the legislative history of the ADEA, which was enacted following the presentation of a Secretary of Labor report regarding problems of older workers. As Krop notes, "[t]he Secretary found no evidence of prejudice against older workers and concluded that the main problem was arbitrary age discrimination based on misconceptions about the abilities of older workers." 34 Stan. L. Rev. at 853 (citing U.S. Dept. of Labor, *The Older American Worker: Age Discrimination in Employment* at 2 (1965)).

Further, the type of discrimination faced by older workers is significantly different from that based on race, sex, or nationality. Not only have older workers not suffered from lifelong discrimination, but the discrimination they face is not a product of invidious stereotypes and hatred. *See* Krop, 34 Stan. L. Rev. at 852. That commentator, *id.*, cites *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), for its holding that unlike those who have been discriminated against on the basis of race, the aged have not historically experienced purposeful unequal treatment or been subjected to disabilities on the basis of stereotypes.

C. The Sole Rationale for Disparate Impact Is Preventing Pretexts for Discrimination

The only legitimate purpose behind the development of the disparate impact theory would be to prevent the use of facially neutral standards as a pretext for racial discrimination, not to require race quotas. This was made clear in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989):

> The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review *would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.*

Id. at 659 (emphasis added).

The Court reemphasized this point in noting that plaintiffs could show that other selection devices without a similarly undesirable impact would also serve the defendant's legitimate interests. By such a showing, the plaintiffs "would prove that [defendant was] *'using [its] tests merely as a "pretext" for discrimination.'*" *Id.* at 660 (emphasis added). The Court thus suggested that the disparate impact doctrine was intended to address pretexts for discrimination, not mere numerical disparities.

However, the Court has not been consistent in stating that disparate impact is merely the manifestation of pretextual discrimination. *Griggs*, 401 U.S. at 432, found that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer had violated the statute. Yet, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court stated that a showing that other tests or selection devices were available that served the employer's legitimate business needs but did not have an undesirable racial effect would be evidence that the employer was using its tests as a pretext for discrimination. *Id.* at 425. *Albemarle* was followed by *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979), which rejected a claim that an employer's strict drug abuse enforcement policy had a disparate impact on minorities. The Court ruled that the trial court's finding that the policy was not motivated by racial animus "forecloses any claim . . . that it was merely a pretext for intentional discrimination." *Id.* at 587.

Next, *Connecticut v. Teal*, 457 U.S. 440 (1982), in rejecting the so-called "bottom line" defense of racial proportionality in the workforce[3] for disparate impact cases, declared that, even if the employer shows the job relatedness of a test, "the plaintiff may prevail if he shows that the employer was using the practice as a mere pretext for discrimination." *Id.* at 447. *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977 (1988), cited factors such as the cost of proposed alternative employee selection devices as "relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment." *Id.* at 998.

On the other hand, *Watson* also stated that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Id.* at 987. It would thus appear that the Court has not been able to decide on the precise rationale behind the disparate impact doctrine. However, since the purpose of civil rights laws is to preclude intentional discrimination, the only proper basis for disparate impact analysis is when the challenged policies or acts are pretexts for discrimination.

[3] The bottom line defense argued that if an employer achieved racial proportionality in its workforce, it did not matter if any employment or promotion practice was racially biased. *Id.* at 442.

II

THE COURTS AND ADMINISTRATIVE AGENCIES, NOT CONGRESS, HAVE EXTENDED DISPARATE IMPACT ANALYSIS TO OTHER LAWS

A. Administrative Agencies Have Sought to Expand the Scope of Disparate Impact Analysis to Other Laws

The disparate impact doctrine was extended to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq., in *Lau v. Nichols.* 414 U.S. 563 (1974). There, nonEnglish-speaking students of Chinese ancestry sued San Francisco school officials alleging that the school district's failure to provide equal educational opportunities violated the Fourteenth Amendment and Title VI. *Id.* at 566. The Court did not reach the Equal Protection Clause argument but instead relied solely on Section 601 of Title VI. *Id.* Although the Court did not use the term "disparate impact," it cited Department of Health, Education & Welfare (HEW) regulations[4] issued pursuant to Section 602 that barred acts that have the effect of discrimination, even though there is no purposeful design to discriminate. *Id.* at 568.

The concurring opinion of Justice Stewart, joined by the Chief Justice and Justice Blackmun, raised a fundamental issue: "The critical question is . . . whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601." The concurrence noted that the validity of a regulation promulgated under a general authorization provision such as

[4] The Court also took note of HEW guidelines that required federally funded school districts to rectify students' language deficiencies. *Id.* at 566-67.

Section 602 of Title VI "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Id.* at 571 (footnote omitted).

This rationale was rejected by *Alexander v. Sandoval*, 532 U.S. 275 (2001), which found that *Lau* interpreted Section 601 itself to prohibit disparate impact discrimination. *Id.* at 285. The Court then noted it

> must face now the question avoided by *Lau*, because we have since rejected *Lau*'s interpretation of § 601 as reaching beyond intentional discrimination. . . . It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations. *Id.*

Although phrased in terms of the private right of action issue, this recognition that disparate impact regulations forbid conduct permitted by statute signals that where Congress has not authorized disparate impact liability, it may not be created out of whole cloth by administrative fiat.

B. Congress Has Limited Disparate Impact Liability

Although Congress has acknowledged the courts' imposition of disparate impact analysis on the statutory scheme of Title VII, it has shown its discomfort with the concept by moving to limit its application. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, for the first time expressly stated that the disparate impact theory applies in Title VII. *See, e.g.*, Section 4, 42 U.S.C. § 2000e-2. And while the Act purported to "respond to the Supreme Court's recent decisions

by restoring the civil rights protections that were dramatically limited by those decisions," Section 2.b, the Act contained substantial limitations on disparate impact liability. Thus Section 102, adding section 1977A, 42 U.S.C. § 1981, provided for damages in actions brought under sections 706 or 717 of the 1964 Civil Rights Act in cases of intentional discrimination but specifically excluding "an employment practice that is unlawful because of its disparate impact."

In Section 106 of the 1991 Act, Congress further restricted the use of disparate impact analysis in test scores through the enactment of Section 703(l), entitled "Prohibition of Discriminatory Use of Test Scores":

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(*l*). Thus even though cutoff scores, for example, may have a disparate impact on the basis of race or sex, employers are prohibited by Section 703(*l*) from adjusting those scores to achieve a more proportional result.

Congress also limited the use of disparate impact analysis by prohibiting the award of punitive damages in such cases. Thus, an action brought under Section 706, 42 U.S.C. § 2000e-5, of the Civil Rights Act, may recover compensatory and punitive damages by alleging unlawful intentional discrimination but not where the charge is only one of disparate impact. *Landgraf v. USI Film Products*, 511 U.S. 244, 252 (1994).

These provisions show that while Congress has acceded to this Court's imposition of disparate impact liability in Title VII, it has limited its application. More relevant here, there is no indication that Congress ever intended to permit expansion of the doctrine beyond Title VII to other laws such as the ADEA.

III

RECOGNIZING THE FLAWS OF DISPARATE IMPACT, THIS COURT HAS LIMITED ITS APPLICATION

Although this Court has recognized the concept of disparate impact liability, it has been uneasy with its application and has often sought to limit it. In *Washington v. Davis*, 426 U.S. 229 (1976), black applicants for a police training program sued under the Equal Protection Clause alleging that the failure rate of blacks was four times that of whites. As evidence of discriminatory intent in the admissions process, the petitioners offered the disparate effect of the test on blacks as compared to whites. *Id.* at 233. The Court held that the petitioners had failed to prove a violation of the Equal Protection Clause. *Id.* at 242. The Court declared that discriminatory intent is the critical element in an equal protection claim and, though disparate impact is not irrelevant to such claim, it is not sufficient as proof of intent. *Id.*

In *Village of Arlington Heights v. Metro Housing Development Corp.*, 429 U.S. 252 (1977), nonprofit housing developers planned to develop a tract of land in a racially diverse neighborhood for residents with low to moderate incomes. When the village refused to rezone the land for multifamily housing, the developers sued under the Equal Protection Clause, alleging the refusal was racially motivated. *Id.* at 258-59. The Court found that the plaintiffs had failed to prove the key element of discriminatory intent. *Id.* at 270. The

Court held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 253.

The applicability of disparate impact in cases of alleged sex discrimination was addressed in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). *Feeney* involved an equal protection claim that the award of veterans' preference in employment had a disparate impact on women, proportionably fewer of whom were veterans. The Court noted that *Washington v. Davis* and *Arlington Heights* recognized that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may be at work. But the Court found that those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results, and this principle applies with equal force to a case involving alleged sex discrimination. *Id.* at 273-74. As the Court concluded:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionally adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.

Id. at 274 (internal citations and quotation marks omitted).

The Court emphasized this point in *Lewis v. Casey*, 518 U.S. 343 (1996) (involving prisoners' right of access to the courts), noting that it rejected the disparate impact theory of the Equal Protection Clause in *Washington v. Davis*.

> There we flatly rejected the idea that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. We held that, absent proof of discriminatory purpose, a law or official act does not violate the Constitution, solely because it has a . . . disproportionate impact.

Id. at 375 (internal citations and quotation marks omitted).

The Court read *Davis* as "acknowledging the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* (internal citations, quotation marks, and parentheses omitted).

Lewis recognized that the *Davis* Court was motivated in no small part by the potentially radical implications of the disparate-impact rationale.

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than the indigent. Under a disparate-impact theory . . . regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down. . . . [W]e rejected in *Davis* the disparate-impact approach in part because of the recognition that [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 376-77 (internal citations and quotation marks omitted).

These acknowledged dangers of the disparate impact rationale apply to the doctrine's application to the ADEA.

IV

SOUND PUBLIC POLICY REASONS REJECT EXPANSION OF DISPARATE IMPACT LIABILITY TO THE ADEA

A. Disparate Impact Liability Is Based on Unauthorized Administrative Regulations

The Equal Employment Opportunity Commission (EEOC), the agency charged with administration of the ADEA, has issued regulations applying disparate impact liability to the ADEA. 29 C.F.R. § 1625.7 (1981). This Court has recognized that "Congress, in enacting Title VII, did not confer upon EEOC authority to promulgate rules or regulations," and specified that the level of deference due EEOC regulations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it a power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). This Court then added that where the EEOC's interpretation is neither "contemporaneous with the statute's enactment nor consistent

since the statute came into law" or "lacks support in the plain language of the statute," it is not entitled to judicial deference. *Id.* at 257-58.

As set forth in Douglas C. Herbert and Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. Tex. L. Rev. 625 (1996) (Herbert and Shelton), the administrative interpretation regarding the application of disparate impact theory to the ADEA has not been consistent. *Id.* at 643. The Department of Labor was charged with administration and enforcement of the ADEA until 1978. *Id.* (citing Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807, 92 Stat. 3781, 3 C.F.R. § 321 (1979)).

> The Department of Labor initially interpreted the ADEA to require only "reasonableness" to be determined "on an individual, case by case basis." [Citing 29 C.F. R. § 860.103(d) (1968).] The ADEA was specifically exempted from the Uniform Guidelines on Employee Selection Procedures, which address the validation of tests with a disparate impact, in 1978. [Citing 29 C.F.R. § 1607.2 (1978).] It was not until 1982 that the EEOC issued regulations stating that the ADEA incorporated the disparate impact theory. [Citing 46 Fed. Reg. 47727 (Sept. 29, 1981), adopting 29 C.F.R. § 1625.7(d).]

Herbert and Shelton, 37 S. Tex. L. Rev. at 643.

This belated shift of interpretation, coupled with the language of the statute, demonstrates that the EEOC contrary interpretation is not entitled to judicial deference.

This Court's growing concern with abuse of the administrative regulatory process was signaled in *Solid Waste*

Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001). In invalidating regulations implementing Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a) (regulating the discharge of dredged and fill material into navigable waters), the Court declared:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

Solid Waste, 531 U.S. at 172-73.

This rule was reemphasized in the context of Title VI by *Alexander v. Sandoval*. This Court there held that while a private cause of action exists to enforce Section 601 prohibiting disparate treatment, that right does not extend to the enforcement of disparate impact regulations promulgated under Section 602. 532 U.S. at 293.

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been

> authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Id. at 291.

In the ADEA context, where Congress has not created a disparate impact cause of action in the statute itself, federal agencies may not engage in administrative sorcery to create that right through regulations.

The disparate impact regulation is based on the fundamental legal error that administrative regulations may interpret a law contrary to the intent of the legislative body that enacted it. In order not to invalidate a whole range of employment policies that inadvertently may be more burdensome in their effect on older workers, Congress intended the ADEA to follow Fourteenth Amendment law and apply only to intentional discrimination. Administrative agencies have no power to alter that policy judgment by extending the law's reach to ban programs that have a disproportionate impact on certain age groups.

B. Disparate Impact Liability Raises the Specter of Quotas

The potential for administrative regulations to be applied in such a manner as to require the use of quotas in direct opposition to the intent of Congress and the mandate of the Fourteenth Amendment was noted with disfavor in *Watson v. Fort Worth Bank & Trust*, 487 U.S. at 992.

> We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord

> with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid "disparate impact" as such.

Id. at 992.

Watson arose in the context of Title VII allegations of employment discrimination. The Court noted that preferential treatment and the use of quotas by public employers under Title VII can violate the Constitution "and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.' " *Id.* at 993 (citations omitted). The Court observed:

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent.

Id.

The same logic applies to ADEA. Allowing this law to evolve into a mandate for age-based quotas would be contrary to Congress' clear intent.

It is time for the courts to rethink the use of disparate impact analysis. When a disparity is caused by intentional discrimination, it should be remedied in an appropriate manner. That is what Congress intended in the enactment of the ADEA and the Civil Rights Act. But when a disparity is the result of policies that result not from intentional discrimination but from neutral factors, the courts should decline to intervene. By focusing on intentional discrimination, the courts can ensure that it is rooted out wherever it may be found. At the same time, by discarding the disparate impact doctrine, the courts can guard against outcomes that, while well-meaning in intent, are counterproductive in practice.

CONCLUSION

For the reasons stated above, the decision of the Fifth Circuit should be affirmed.

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Respectfully submitted,

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